ELEMENTARY LAW

BY

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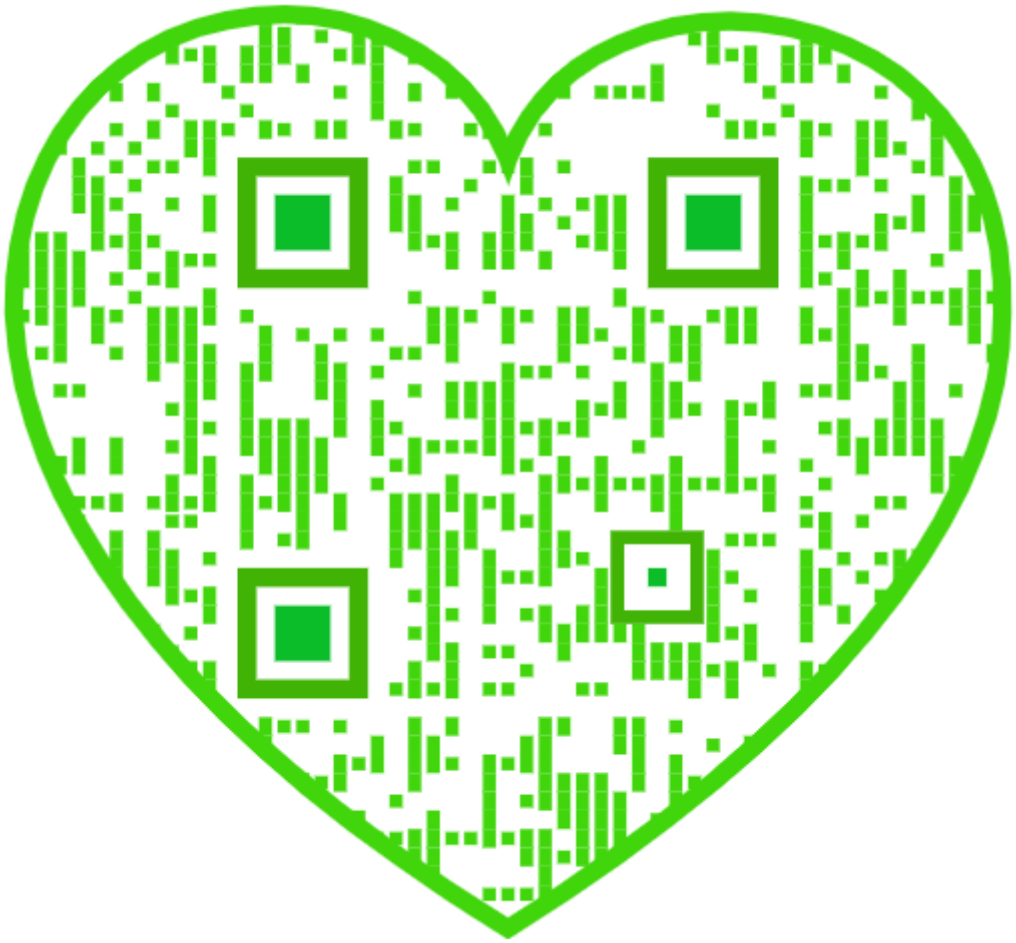
NEW EDITION REVISED AND ENLARGED

WITH REFERENCES TO NEARLY FIVE THOUSAND PRESCRIBED COLLATERAL READINGS FROM MORE THAN TWO HUNDRED STANDARD TREATISES ON ALL DEPARTMENTS OF THE COMMON LAW

BOSTON
LITTLE, BROWN, AND COMPANY
1910



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TO

HENDRICK BRADLEY WRIGHT

OF PENNSYLVANIA

IN REMEMBRANCE OF HIS KINDNESS AS AN INSTRUCTOR

AND HIS FIDELITY AS A FRIEND

THIS TREATISE

IS

RESPECTFULLY INSCRIBED

PREFACE

In preparing this new edition of a work which, in one form or another, has been in use among law students for the past forty years, the author has kept constantly in mind the fact that the ordinary and legitimate purpose of such students is to qualify themselves to begin the practice of the law with credit to their profession, with safety to their clients, and with profit to themselves. The young practitioner is not expected to be a legal philosopher or historian or critic, but to be able to give sound advice upon those legal questions which arise in common social and domestic life, to transact customary legal business with prudence and sagacity, and to conduct to a just issue such litigated cases as are likely to be confided to his care. To fit him to discharge these duties he needs an accurate and fairly extensive knowledge of the general rules and doctrines which constitute the great body of the law; a special familiarity with those departments of the law which govern the commercial transactions of the present day; and a practical training in those forms and methods of procedure which it will be his daily duty to employ.

Having this purpose of the student steadily in view the author has endeavored to adapt his text-books to the requirements of law students as they have become known to him through a long life of professional instruction and experience. Himself enjoying when a student the example and direction of one of the great advocates of the past century:

engaged in active practice for more than a generation; serving from time to time as clerk and judge of courts both criminal and civil; and all the while devoting many of his hours and thoughts to the training of candidates for admission to the Bar, — he has grown more and more confirmed in his conclusion that the proper way to educate young lawyers is: *First,* to give them a thorough knowledge of all the fundamental and universally accepted principles and rules of modern American Law through the careful study of a series of its standard text-books; *Second,* to follow this instruction with the detailed investigation of the most important branches of the law in more expansive treatises and leading cases; and *Third,* to place them in a local school or office where they may perceive the practical application of the doctrines they have learned from books, and acquire by actual participation some facility in the methods which they will so soon have occasion to pursue.

It is to aid the student and his teachers, in carrying on the earlier portion of his legal education according to these views, that the elementary text-books of the present author have been prepared. In his "Elements of American Jurisprudence" he has endeavored to set before the student the Law as a totality, — explaining its nature, its origin, its history, its divisions, its forms, its interpretation, and the methods of its application to practical affairs, with whatever else a student ought to know *about* the Law, as distinguished from his knowledge of the rules which constitute the Law itself. In his "Elementary Law," especially in this new edition, he has attempted to state the universal and established rules of law, now in force in this country, in such detail and with such exactness as to dispense the student from the further study of a number of its ancient and well-settled branches, and to equip him for recourse to larger text-books

and leading cases in his investigation of the more important and progressive departments of the law. For use in connection with this statement he has collected several thousand valuable collateral readings from the standard treatises, thus opening to the student a vast field for legal research, to be explored by him according to his opportunities and zeal. In his "Elements of Forensic Oratory" he has discussed the principles which govern all the processes of successful advocacy; directed the young lawyer whence to seek and how to collect the facts which constitute his cause; where to find and how to estimate and collate his law; how to deal with clients, witnesses, judges, and opposing counsel; how to frame his arguments, and how to present his claims to courts and juries, — an early training often overlooked, but without which no practitioner ought ever to be allowed to put in jeopardy either his client's interests or his own. It is the author's judgment that to these three volumes the student can profitably devote a large proportion of his first year of professional study, and thus lay a foundation on which his subsequent legal structures can securely stand.

WILLIAM C. ROBINSON.

WASHINGTON, Dec. 8, 1909.

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ELEMENTARY LAW

INTRODUCTION

§ 1. Of Law in General.

Law, *in its widest sense,* is a rule of action prescribed by a superior and which the inferior is bound to obey. Law, *in its technical sense,* is a rule of civil conduct, prescribed by competent political authority, commanding certain things as necessary to, and forbidding other certain things as inconsistent with, the peace and order of society. Law, in its widest sense, includes: (1) The *Eternal Law,* by which the Supreme Reason and Will governs the entire universe; (2) The *Natural Law,* which is the manifestation of the Eternal Law through the attributes and operations of created beings; (3) The *Positive Law,* which is a rule prescribed to rational creatures for the regulation of their voluntary conduct; (4) The *Divine Law,* which is the Positive Law directly imposed by the Creator himself upon his rational creatures; (5) The *Human Law,* which is the Positive Law prescribed by man for his own government or that of other men; (6) *Law in its technical or political sense,* which is the Human Law imposed by sovereign States upon themselves, or upon their subjects, for the protection of legal rights and the prevention or redress of legal wrongs. It is to the statement and explanation of Law, in its political sense, that this elementary treatise is devoted.

Remarks. It is of the highest importance to the student that he should clearly understand, at the very commencement of his studies, precisely what *a law,* in its technical sense, is and what it is not. A law is not *advice* or *counsel,* to be followed or rejected at the option of the hearer. It is not an *hypothesis,* supported by arguments and examples suggested to the memory or observation of the inquirer. It is not an *inference,* derived by the inductive process from the collection and comparison of many individual cases, in which the facts were more or less similar, and to which a more or less reasonable and reliable doctrine has

been applied. On the contrary, a law is *a definite, positive, practical, and practicable rule*, imposed by an authority which expects to be obeyed and to enforce obedience by penalties sufficiently severe. It is either a rule which is promulgated in some constitution, treaty, statute, or other formal enactment where it can be readily found, carefully studied, and accurately understood; or it is a rule which is permanently embodied and preserved in some universally accepted definition or maxim which is contained, asserted, or explained in an authoritative treatise or leading judicial decision of the unwritten law. Nothing less certain or less imperative than such a rule is in any proper sense a *rule of law*. The number of these rules, though very great, is limited, and the whole number taken together, as they are prescribed and enforced in any given place, at any given time, constitute "*The Law*" of that particular period and locality. The prudent student will concentrate his attention on these rules, and endeavor to acquire a competent knowledge and understanding of each one of them, instead of consuming his energies and time on conjectural propositions and inconclusive discussions which will never make him a true *lawyer*, — a "*man, learned in the law.*"

READ: 1 Bl. Com., pp. 38–53;
Rob. Am. Jur., §§ 1–7;
Wharton, American Law, §§ 1, 2, 42–64;
Barbour, Rights of Persons and Property, pp. 1–4;
Dwight, Law of Persons and Property, pp. 5–8;
Walker, American Law, §§ 1, 9, 16;
Andrews, American Law, §§ 18–36;
Clark, Elementary Law, §§ 1–4, 27;
Bishop on Contracts (Early Ed.), §§ 1–17;
Benjamin on Contracts, pp. 1–4.

§ 2. Of the Purpose of Law: Legal Rights: Legal Wrongs.

The *purpose of law* is the definition and assertion of legal rights; and, as collateral thereto, the prevention and punishment of legal wrongs. A *right* is the authority, inherent in every person, to freely exercise his natural and acquired capabilities within the limits fixed by reason and justice. Rights exist, primarily, by virtue of the natural law, but when recognized and protected by the law of the State they become *legal rights;* and the wrongs by which they are invaded become *legal wrongs*, and demand and receive redress through *legal remedies*. Hence the maxim, "*Ubi Jus, ibi Remedium,*" which declares that legal right and legal remedy are inseparable.

Rem. A large proportion of the capabilities of human beings require a state of society for their exercise and enjoyment; and to their exercise in society with freedom, reason, and justice it is necessary that society itself should be preserved in a condition of peace and order. This can be accomplished only by laws imposed by a supreme authority which can compel obedience; and hence spontaneously arises in all social aggregations some system of government, called "*the State*," by which rules are prescribed defining rights and providing for the punishment of wrongs. What particular natural rights shall thus be asserted and protected by the State, and thereby be made legal rights, it is for the State itself to determine. Numerous natural rights never have been, and perhaps never will be, made legal rights; but whatever rights the State does recognize it is its duty to defend and vindicate with all its sovereign powers.

READ: Rob. Am. Jur., §§ 119–122, 148;
Wharton, American Law, §§ 4–11, 66–114;
Dwight, Law of Persons and Property, pp. 1, 2, 4, 8;
Walker, American Law, § 5;
Andrews, American Law, §§ 1–17, 61–76;
Clark, Elementary Law, §§ 58, 59;
Benjamin on Contracts, pp. 4–6.

§ 3. Of Rights Public and Private: Public and Private Law.

Legal rights are divisible into Public Rights and Private Rights. *Public Rights* are those which inhere in the State or in its governmental agents, or in private persons as against the State or its agents. *Private Rights* are those which reside in private persons, and are assertable only against other private individuals. Conformable to this division of rights is the division of law into Public Law and Private Law. Public rights are defined and enforced by *Public Law.* Private rights are asserted and protected by *Private Law.*

Rem. The essential difference between a public right and a private right is that in the former the interest and welfare of the State at large are directly involved, either as the personality on whose behalf the right is asserted, or as the community against whom the right is maintained. This gives to a public right a far greater importance than can ever attach to a private right; and hence, in every case of collision between them, the private right always yields to the public right, according to the maxim, "*Salus Populi Suprema Lex.*"

READ: Rob. Am. Jur., §§ 123, 175;
Dwight, Law of Persons and Property, pp. 4, 5;
Clark, Elementary Law, §§ 73–80.

§ 4. Of International Law: National Law.

Law is also divided into International Law and National Law. *International Law* is that rule of civil conduct which is established by the common consent of civilized nations, to regulate their intercourse with one another. *National Law*, called also *Municipal Law*, is that rule of civil conduct which is prescribed by the supreme power in a particular State, and regulates the intercourse of that State with its subjects and of those subjects with each other.

Rem. International Law is one form of Public Law, and is expressed in the usages of nations and in the treaties made between them. It was formerly regarded as wanting one essential attribute of law, in that it could not be enforced against a nation which refused to obey it. In modern times this defect has largely been supplied, and disobedient nations can now be punished by exclusion from "the family of nations" with all its attendant disadvantages. *National Law* includes all Private Law, and some forms of Public Law, such as Criminal Law and Constitutional Law.

READ: Rob. Am. Jur., §§ 11, 166, 171, 172;
Wharton, American Law, §§ 3, 118–134;
Walker, American Law, § 3;
Clark, Elementary Law, § 5.

§ 5. Of the National Law of the United States of America: the Common Law.

The *National Law established in the United States of America* is derived mainly from the laws of England as they existed at the time of the American Revolution. These laws were brought to this country by the English colonists, and were observed by them as far as seemed suitable to their new conditions. When the colonies became independent, these laws were still preserved; and to them others were added, either by new enactment or by adoption from the Civil Law by which the French and Spanish colonists were governed. As the National Laws of England have long been known as the *Common Law*, that name is now applied to our own national system also.

Rem. The term "Common Law" has various meanings: (1) It denotes the whole body of laws observed by English-speaking nations, and distinguishes it from the Roman or Civil Law which prevails in Continental Europe, in the Spanish-American States, and in some other portions of the civilized world; (2) In another sense, it is applied to the English laws recognized in this country before the Revolution, and distinguishes them from the laws which have been enacted since the Revolution by our individual States; (3) In quite a different sense it indicates the ancient customary law of England, and distinguishes it from the additions made by Parliament and other legislative bodies, — nearly the same distinction as that expressed by the terms *Written Law* and *Unwritten Law;* (4) It also signifies the remedies and methods of procedure administered by the earliest English courts of justice, and distinguishes them from those adopted by other tribunals, such as courts of equity, courts of admiralty, courts of probate, and the military courts. This equivocal use of the term will at first confuse the student; but he will soon become accustomed to these variations and will then readily perceive from the context in which of these meanings the phrase is being employed.

READ: Rob. Am. Jur., §§ 10, 14, 15, 184–190;
Dillon, Laws and Jurisprudence of England and America, pp. 22–27, 155–157, 350–388;
Barbour, Rights of Persons and Property, pp. 4–7;
Walker, American Law, § 2;
Andrews, American Law, §§ 153–158;
Clark, Elementary Law, §§ 31, 32, 34.

§ 6. Of the National Law of the United States of America: Maritime Law: Ecclesiastical Law.

Other elements entering into the National Law of the United States are the Maritime Law and the Ecclesiastical Law. *Maritime Law* is that body of rules which governs the instruments and the operations of commerce upon the high seas. This is the oldest and most universal of all known systems of law, and enters into the National Law of all civilized countries so far as they participate in maritime affairs. *Ecclesiastical Law* is that body of rules by which religious associations regulate their internal relations and the conduct of their members. These rules, when not regarded by the State as hostile to its own interests or its sovereignty, are recognized by it as imposing contract or *quasi* contract obligations, and are enforced by it whenever controversies involving them are submitted to its determination.

Rem. Still other ingredients than those enumerated in the text become, from time to time, component parts of every body of National Law. Thus many rules of International Law, and numerous provisions of the treaties between States, relate to the conduct of individual citizens, and for the purpose of carrying them into practical effect are incorporated into the National Laws of the respective States. National Law is not, therefore, a fixed and permanent system, but a system constantly enlarging in scope and varying in detail, to meet the changes and advancement of society.

READ: Rob. Am. Jur., §§ 12, 13, 341;
Wharton, American Law, § 36;
Walker, American Law, § 18;
Clark, Elementary Law, §§ 6, 7, 29, 33.

§ 7. Of Federal and State Law.

In the United States of America two sovereignties exist: (1) That of the United States as a nation; (2) That of the Individual States of which the nation is composed. From each of these sovereignties emanate distinct systems of national law which are known respectively as Federal Law and State Law. *Federal Law* is that rule of civil conduct which is prescribed by the supreme power in the United States considered as a nation, and regulates in matters of a national character the intercourse of the Federal Government with the people, and that of the people with one another or with the citizens of foreign States. *State Law* is that rule of civil conduct which is prescribed by the supreme power in each individual State, and regulates, in all matters not of a national character, the intercourse of that State with its own people and of its people among themselves.

Rem. The line of demarcation between State and Federal authority is fluctuating and uncertain. Many matters are clearly of a national character; others are evidently not so; but between these two well-defined extremes there is a vast middle ground over which it may at any given moment be doubtful whether State or Federal authority should prevail. Within this middle ground either authority may be exercised until the doubt is removed. During the last fifty years the current of events has extended Federal jurisdiction to many subjects once governed by State Law, and there is now a general tendency to solve all doubts in favor of the Federal authority.

READ: Rob. Am. Jur., §§ 179–183;
Cooley, Const. Law, pp. 33–38, 66–85, 152–159, 182–195;
Dillon, Laws and Jurisprudence of England and America, pp. 216–223;
Rorer, Interstate Law, pp. 1–3, 9–21, 84–86, 336–346.

§ 8. Of the Unwritten and the Written Law.

American National Law, like other branches of the Common Law, is also divisible into Unwritten Law and Written Law. *Unwritten Law*, called from its mode of development the *customary law*, embraces those rules of civil conduct which originated in the common wisdom and experience of society, became in time established customs, and finally received judicial sanction and affirmance in the decisions of the courts of last resort. *Written Law* includes those rules of civil conduct which have been prescribed directly, in so many words, by the supreme power of the State itself.

Rem. The term "Unwritten Law" does not denote that this division of the law still remains unwritten. On the contrary, by far the greater part of legal literature is occupied with the expression of the Unwritten Law. The real distinction is that in the Written Law not only the *mental concept* of the rule, but the *words also* in which it is expressed, are of supreme authority; while in the Unwritten Law the *concept* is the rule in whatsoever language it may be declared. A rule of the Written Law, being thus measured by its words, is limited and inflexible, though at the same time more definite and intelligible than the same rule would be if it remained unwritten. Obvious advantages attach to each of these modes of promulgating law. The Unwritten Law is better suited for asserting general rights and duties; the Written for prescribing methods of procedure or forbidding crimes.

READ: 1 Bl. Com., pp. 62–64;
Rob. Am. Jur., §§ 214–216, 236–238;
Wharton, American Law, § 12;
Clark, Elementary Law, § 28;
Dwarris on Statutes (Potter Ed.), pp. 33–46.

§ 9. Of the Development of the Unwritten Law.

Unwritten Law is constantly developing by the judicial recognition, as rules of law, of customs hitherto unrecognized. A *custom* is a usage, or habitual mode of action, adopted between

related persons by express or tacit agreement, and continued long enough to be rightfully relied on by them as a rule governing their conduct in their dealings with each other. When such a custom is violated to the injury of either party, and a legal controversy arises as to its validity, the judgment of a competent court, sustaining and enforcing the custom, makes it the rule of law controlling the conduct of the parties in that particular case. When subsequent controversies between the same or other parties, involving precisely the same custom, are brought before the same court, or a court of inferior authority in the same territorial jurisdiction, the *doctrine of stare decisis*, which obliges equal and inferior courts to follow the rulings of preceding and superior tribunals unless they appear to be erroneous, compels a similar decision affirming the custom and adds to its authority; and thus is gradually built up a rule of law which binds all courts within that jurisdiction until it is reversed or modified by statute or by the judgment of a higher court. A rule of law, thus developed, is law only in the State by whose courts it is asserted, but may be followed, amended, or repudiated by the courts of other States as they deem best; and hence until adopted by all the States never becomes a general rule. Meanwhile the cases in which the custom is stated, discussed, rejected, or affirmed, are useful for argument and exposition wherever the same question is raised, and thus aid in the eventual establishment of a reasonable, universal, and permanent doctrine of the law.

Rem. That a custom may receive this judicial sanction it must be: (1) *Immemorial*, — that is, it must have existed for a sufficient period of time to have become established as a rule of conduct in that class of cases of which it is henceforth to be regarded as the law; (2) *Continued*, — that is, it must not have been alternated with antagonistic modes of action, but must have been constantly applied whenever any of this class of cases has arisen; (3) *Peaceable*, — that is, it must not have been subject to contention or dispute, but have been acquiesced in by all persons to whose actions it pertained; (4) *Reasonable*, — that is, it must not be opposed to any fundamental principle of justice, nor in its practical operation be injurious to the public or to that class of persons to whose conduct it relates; (5) *Certain*, — that is, it must not, either in the rights which it confers or in the duties which it imposes, be indefinite and open to conjecture, but must furnish to all persons who are interested in such cases

a reliable and intelligible rule of conduct; (6) *Compulsory*, — that is, its observance must not have been optional with individuals, but must have been respected by those persons generally to whose relations it pertains, as a rule which in honesty and good faith they were under an obligation to obey; (7) *Consistent with other customs*, — that is, it must not limit or contradict the observance of any other judicially established custom of the same State by which this class of cases is already governed, unless it is apparent that the time has come when such former custom should be modified or overruled. The customs and usages thus presented to the courts for judicial recognition may be either *general customs* relating to universal interests and observed by all the people of the State; or *particular customs* restricted to some special localities, classes of persons, objects of property, or kinds of trade. At first they are mere allegations to be proved by evidence like other matters of fact; but when once judicially recognized they are cited from the books like other rules of law. The bulk of all departments of our law, such as the Law of Property, the Law of Contracts, the Law of Personal and Family Rights, has in this manner gradually emerged, in the course of ages, from human instincts and experience under the guidance of the Natural Law; and the sources which supplied it will prove inexhaustible under the pressure of all future needs.

READ: 1 Bl. Com., pp. 67–79;
Rob. Am. Jur. §§ 217–226;
2 Greenleaf, Evidence, §§ 248–252;
Wharton, American Law, §§ 14–36;
Barbour, Rights of Persons and Property, pp. 46–50;
Walker, American Law, § 18;
Andrews, American Law, §§ 159–167;
Clark, Elementary Law, § 30;
Lawson, Usages and Customs, pp. 1–112;
Browne, Usages and Customs (Clarke Ed.), §§ 1–35, 39–42, 68–73, 79–86, 130, 141.

§ 10. Of the Expression of the Unwritten Law in Maxims, Definitions, and Judicial Decisions.

Unwritten Law has been expressed in maxims, definitions, and judicial decisions. A *maxim* is a short and formal statement of some established principle of law. Nearly three thousand of these maxims now exist, many of which are of great antiquity, and most of which are of the highest authority and value. A *definition* is an enumeration of the distinguishing characteristics of the act, the object, or the right defined. The prin-

cipal definitions of the common law are very ancient, and are regarded by the courts with great respect. A *judicial decision* is the adjudication of a competent court, in a case within its jurisdiction, upon some controverted rule of conduct. It may take the form of a recognition and affirmance of a disputed rule, or of the application of a known rule to a certain state of facts. In either form it is the promulgation of a law; the first form being its simple statement as a rule, the second form indicating its practical scope and obligation. These maxims, definitions, and judicial decisions are now contained in the Treatises and Digests of the Common Law, and in those Reports of adjudged cases which, beginning with the "Year Books" in the reign of Edward II. (A. D. 1324), have been continued to the present day.

Rem. The maxims and definitions resemble written law in that the words in which they are expressed are an essential portion of the rule and usually admit of no equivalents. The definitions are not *descriptive* but *prescriptive* definitions, — that is, they determine the attributes of the rule or thing defined, and not merely describe them; and hence receive the same exact literal interpretation which is given to the written law, although they differ from it in their origin, which is custom or tradition and not the direct verbal enactment of the State. Judicial decisions, on the other hand, are rarely expressed in accurate specific words; a careful and laborious comparison of the facts from which the controversy has arisen, and the questions of law presented thereby, with the ultimate decision of the court thereon, being generally necessary to ascertain the *ratio decidendi*, or conclusion of law at which the judges have arrived. The relation of the maxims to the other forms of law is illustrated by the fact that on two of them nearly all other rules of law are based. These are: (1) *Salus Populi Suprema Lex*, which is the foundation of the whole body of Public Law; and (2) *Sic Utero Tuo ut Alienum non Lædas*, from which most of the rules of Private Law have been derived.

READ: 1 Bl. Com., pp. 63–69;
Rob. Am. Jur., §§ 227–235;
Dwight, Law of Persons and Property, pp. 15–28;
Hughes, Grounds and Rudiments, §§ 1–71.

§ 11. Of the Interpretation of the Unwritten Law.

In order to apply a rule of law to practical affairs its meaning must be ascertained, and where the words alone are not entirely

clear a process of interpretation becomes necessary to determine the scope and intended operation of the rule. In the maxims and definitions the words are a part of the rule; and therefore the rule means what the words mean, and the process of interpretation consists in ascertaining the signification of the words. But in judicial decisions, where the principle or precept embodied in the words is the object of investigation, and may in the decision under scrutiny be obscurely or imperfectly expressed, other standards must be resorted to for the solution of the difficulty. Among these the most useful are the following: (1) Other judicial decisions of the courts of the same State upon the same question; (2) Judicial decisions of the courts of the same State upon analogous questions; (3) Self-evident principles of reason, justice, and utility; (4) The practical construction given to the rule by the people whom it governs; (5) The opinions of learned commentators upon the rule; (6) The rules which regulate cognate branches of the law; (7) The doctrines of other States in reference to the same subject-matter.

Rem. It is the function of the courts to interpret those rules of law which apply to the cases submitted to their judgment; and it is the duty of the counsel employed in such cases to aid the courts by preparing and presenting to them the various considerations which shed light upon the true meaning of the rule. Mere knowledge of the rules of law is, therefore, not sufficient for the equipment of a lawyer. He must be able to *expound* the rule; to test its different possible meanings by the standards above enumerated; and to communicate his process of interpretation and its results clearly and convincingly to the court. This involves not merely the exercise of memory but the highest powers of research and deduction; and requires a careful previous training in logic, rhetoric, and forensic oratory which the ambitious student will do well not to neglect.

READ: Rob. Am. Jur., §§ 283–292;
Robinson, Forensic Oratory, Preface, §§ 142–153;
Clark, Elementary Law, §§ 54, 57;
Black, Interpretation of Laws, §§ 146–149, 153–161;
Wambaugh, Study of Cases, book i, chaps. ii, iii, v–viii.

§ 12. Of the Forms of Written Law: Constitutions.

Written Law is a rule of civil conduct prescribed in a specific form of words by the legislative authority of the State. The rule

may have been a rule of the unwritten law which is now crystallized into a precise and permanent verbal expression; or it may be a rule which is wholly new and is established to meet some novel social need. In modern States written law assumes four forms: (1) Constitutions; (2) Treaties; (3) Codes; and (4) Statutes. A *Constitution* is that organic law of the State which defines its political powers, its form and method of government, and its public rights and duties. It is generally framed by a convention appointed for that purpose, and then adopted by the whole people, and may be amended by a similar proceeding. It may take effect at once *proprio vigore*, or be carried into operation by statutes which are subsequently enacted. It is the supreme law of the State, and no rule which is inconsistent with it can be of any force or validity.

Rem. In this country the United States as a nation, and also every individual State, has its own written Constitution. All these constitutions derive their fundamental principles from the unwritten constitution of England, and are interpreted by the Unwritten Law. These constitutions resemble one another in general contents, but vary in details to suit the conditions of their respective peoples. In one important feature the Federal Constitution differs from the constitutions of the individual States. The States were, or were presumed to be, complete and independent sovereignties before the adoption of their constitutions; and hence their constitutions operate not to create but as a *limitation* of their powers. The United States as a nation was, on the contrary, created by the adoption of the Federal Constitution, which is for that reason considered as a *grant* of powers. An individual State, therefore, has all political powers except those of which it is deprived by its own constitution or that of the United States; while the United States, as a nation, has no political powers except those which are conferred upon it, expressly or impliedly, by the Federal Constitution.

READ: Rob. Am. Jur., §§ 239–253;
Cooley, Const. Law, pp. 3–40;
Barbour, Rights of Persons and Property, p. 7;
Walker, American Law, § 17;
Andrews, American Law, §§ 171–181;
Clark, Elementary Law, §§ 38–40, 43, 81–84;
Bishop, Written Laws, §§ 1–12, 15, 16;
Jameson, Constitutional Conventions, §§ 63–124, 260, 261, 267–269, 272–307, 314–326, 479–488, 496–500, 525–535.

§ 13. Of the Forms of Written Law: Treaties.

A *treaty* is a compact between two or more independent States. The power to make or break a treaty is a necessary element of sovereignty, and it therefore binds the parties to it only until one or the other of them formally repudiates it. A treaty is usually *prepared and signed* by a joint commission of the negotiating States, and is then submitted to them for ratification. It *takes effect* as to the States from the date of signature, and as to private persons from the date of ratification. It may relate to any matter of international interest, whether political or commercial; and, subject to the constitutions of the signatory States, becomes their supreme law, overriding all other legislative enactments. In the United States a treaty and an Act of Congress are of equal authority, and when one is inconsistent with the other the latest must prevail.

Rem. Treaties on behalf of the United States are made by the President with the concurrence of two thirds of the Senate. Such treaties are a part of the law of every individual State, and govern its people in all matters to which the treaty relates. Treaties may be amended or abrogated, but are not nullified by war between the parties; though upon their violation the injured State may refuse to perform its own treaty obligations, or may retaliate upon the offending State, or in extreme cases may itself resort to war.

READ: Rob. Am. Jur., §§ 254–260;
Cooley, Const. Law, pp. 117, 118;
Barbour, Rights of Persons and Property, pp. 7–9;
Walker, American Law, § 17;
Clark, Elementary Law, § 42;
Bishop, Written Laws, §§ 13, 14.

§ 14. Of the Forms of Written Law: Codes.

A *code* is a formulated statement of the entire law of a State, in all its details, as applicable to all persons and to all subjects. It issues from the supreme legislative authority in the State, and supersedes and abolishes every former law. It is intended by its nature to be permanent and final; but whenever enacted and applied by a progressive nation is soon added to or modified by custom, and thus again becomes associated with the Unwritten Law. Several famous codes have appeared in the course of

human history, and the system now has its advocates among both English and American jurists, but as it is opposed alike to the spirit and the practical operation of the Common Law there seems to be no prospect of its general adoption.

Rem. The *principal codes* of ancient and modern times were the following: (1) The Egyptian Code (B. C. 1500, or earlier), the probable source of Jewish, Greek, and perhaps Roman legislation; (2) The Mosaic Code (B. C. 1490), found in the Old Testament; (3) The Hindoo Code (B. C. 1280), or Laws of Menu; (4) The Code of Lycurgus (B. C. 1100); (5) The Code of Draco (B. C. 624); (6) The Code of Solon (B. C. 590); (7) The Roman Code of the Twelve Tables (B. C. 449); (8) The Theodosian Code (A. D. 438); (9) The Code of Justinian (A. D. 529); (10) The Gothic Code of Alaric (A. D. 481); (11) The Salic Law (date unknown); (12) The French Code of Marillac (A. D. 1629); (13) The Code of Louis XIV. (A. D. 1685); (14) The Code of Louis XV. (A. D. 1774); (15) The Code Napoleon (A. D. 1808). Other ancient codes probably exist, as yet undiscovered, among the monuments of oriental civilization. In this country the name "*Code*" is sometimes applied to codifications of particular departments of law, — such as Code Pleading, Code Procedure, the Criminal Code, etc.

READ: Rob. Am. Jur., §§ 261, 262;
Dillon, Laws and Jurisprudence of England and America, pp. 179–183, 256–260, 342, 343;
Walker, American Law, § 19.

§ 15. Of the Forms of Written Law: Statutes.

A *statute* is a formulated statement of some specific rule, governing some particular objects, acts, or persons. The name includes not only the enactments of the supreme legislative body, but also the ordinances of municipal corporations, the regulations prescribed by the heads of executive departments, and the formal rules of practice established by the courts. The *validity of a statute* depends upon the authority of the legislative body to prescribe it, as determined by constitutions, treaties, and other superior laws, and upon its enactment according to the required forms of legislative action. It generally *takes effect* from the date of its passage, unless some other date is fixed by law; and continues in force until it expires by its own limitation, or is suspended or repealed by the body which enacted it. A statute may

be *repealed* by the express words or by the necessary limitations of a later statute. The repeal may be total or partial according to the scope of the repealing statute, and so much of the old law will remain in force as is consistent with the provisions of the new. When a repealing statute is itself repealed, the old law will revive unless a contrary intention of the legislature is apparent, or the old law would be in conflict with other subsequent enactments.

Rem. A *statute may contain:* (1) The Title, — which specifies to what class or general body of rules the statute belongs; (2) The Preamble, — or recital of the circumstances which prompted the legislative body to enact the statute; (3) The Enacting Clause, — which sets forth the rule prescribed; (4) The Provisos, — which are qualifications grafted upon the enacting clause, taking some special matter out of its operation and making a different rule concerning it; (5) The Exceptions, — or limitations attached to the enacting clause, preventing it from operating on some matter which it would otherwise include. An enacting clause is essential to every statute; the other parts are used when necessary to express its exact meaning. The constitutions of some States require that every statute shall have a title which shall designate but one subject, to which all the provisions of the enacting clause shall be confined. The object of this rule is to prevent confusion in the interpretation and application of the statute, as well as fraud in its original enactment.

READ: Rob. Am. Jur., §§ 263–267, 274–282;
Cooley, Const. Law, pp. 390–392;
Wharton, American Law, §§ 13, 602;
Barbour, Rights of Persons and Property, pp. 23–33, 43–46;
Dwight, Law of Persons and Property, pp. 28, 39–43;
Walker, American Law, § 17;
Clark, Elementary Law, §§ 41, 44–47;
Bishop, Written Laws, §§ 17–41, 43–67, 147–187;
Dwarris on Statutes, (Potter Ed.) pp. 58–67, 76–120, 153–160;
Sutherland on Statutes (Lewis Ed.), §§ 1–188, 238, 244–295, 296–308, 339–357.

§ 16. Of the Forms of Written Law: Classes of Statutes.

Statutes are divisible into several classes: (1) *Declaratory Statutes,* which are intended to remove a doubt as to the existence or meaning of some former law, or to carry into effect some provision of a constitution or a treaty; (2) *Remedial Statutes,*

which enlarge or restrain the operation of a former law, or prescribe a law altogether new; (3) *Affirmative Statutes,* which are remedial statutes affirming a new rule without prohibiting the observance of the old; (4) *Negative Statutes,* which repeal the former law, and establish in its place a different rule; (5) *Public Statutes,* which relate to the government, or the public interest, or to all persons, or to the entire number of any group of persons; (6) *Private Statutes,* which relate only to a single person, or to a few persons of a class, and have no special reference to the community at large; (7) *General Statutes,* which are in force throughout the whole territory which is governed by the State; (8) *Local Statutes,* which relate only to the persons or property within a limited area; (9) *Perpetual Statutes,* which have no predetermined period of duration; (10) *Temporary Statutes,* whose continuance as law is limited either by their express language, or by the nature of the subjects to which they relate; (11) *Mandatory Statutes,* which command that certain things shall be done or forborne; (12) *Directory Statutes,* which point out methods in which legal acts may be performed but do not oblige persons to follow them, thus leaving every one at liberty to adopt previously existing methods, if he prefers them; (13) *Prospective Statutes,* which contemplate only the future, and command or direct what is thereafter to be done or forborne; (14) *Retrospective Statutes,* which change the legal conditions resulting from past acts or forbearances, — either depriving parties of benefits, or relieving them from obligations, which existed under former laws; (15) *Penal Statutes,* which impose a penalty in favor of the public upon persons who are guilty of public wrong.

Rem. These classes of statutes differ from one another not only in the essential characteristics expressed in their definitions, but in many details of interpretation and application. Thus, in case of doubt *statutes are presumed* to be remedial rather than penal; affirmative rather than negative; public rather than private; general rather than local; perpetual rather than temporary; directory rather than mandatory; prospective rather than retrospective. Moreover, the *courts take judicial notice* of public statutes, while private statutes must be pleaded and proved.

READ: 1 Bl. Com., pp. 86, 87;
Rob. Am. Jur., §§ 268–273;
Wharton, American Law, §§ 598–601;

Barbour, Rights of Persons and Property, pp. 9–12;
Dwight, Law of Persons and Property, pp. 29, 54, 55;
Clark, Elementary Law, §§ 48–53;
Bishop, Written Laws, §§ 42–42 *e*, 254–256;
Dwarris on Statutes (Potter Ed.), pp. 52–58, 68–76, 164–168;
Sutherland on Statutes (Lewis Ed.), §§ 189–203, 229–231, 324–339.

§ 17. Of the Interpretation of the Written Law.

Written Law is interpreted by ascertaining the meaning of the words in which it is expressed, since these words, when properly interpreted, constitute the law. Where, therefore, the words have no meaning there is no law; and where the words are clear the law is clear, and requires no further interpretation. But when the words are capable of two or more meanings they are not of themselves sufficient, and further interpretation becomes necessary in order to determine which meaning is the law. To ascertain this meaning the following rules are to be observed: (1) Words are to be taken in their *ordinary popular meaning* at the time of the enactment of the law, unless they are words peculiar to some science, art, or trade, or are evidently here used in some special sense, and then they are to have their technical or peculiar meaning; (2) Words of obscure meaning *may be made clear* by comparing them with the context of the same statute, or with its title, preamble, provisos or punctuation, or with other statutes or legal rules *in pari materia* relating to the same subject; (3) Words *may be interpreted* by examining judicial decisions in which they have been practically applied, or by the conduct of those who have endeavored to obey them, or by the general opinion of the people as to their legal effect, or by the apparent intention of the legislative body in selecting them to express the law; (4) Certain classes of laws must be *strictly interpreted* by confining their meaning and operation to the necessary signification of the words, to wit, — *a.* Penal Laws; *b.* Laws entailing forfeitures or penalties; *c.* Laws in derogation of customary rights, or of rights existing under the Unwritten Law; *d.* Laws conferring police powers; *e.* Laws exempting particular persons from general obligations, or imposing special obligations on particular persons; *f.* Laws of taxation or eminent domain; *g.* Laws creating monopolies or other exclusive privileges; *h.* Laws delegating or suspending governmental powers;

i. Laws conferring the right to sue the State; *j.* Laws creating new remedies, or affecting the customary jurisdiction of the courts; *k.* Retrospective laws; *l.* Laws repealing previous laws; *m.* Laws enacted to promote a private interest; *n.* Provisos restricting the enacting clauses of remedial statutes; (5) Remedial laws are to be *liberally interpreted* in order to give them their full force and effect in the promotion of the public welfare.

Rem. Subordinate to these principal rules of interpretation are many others to which the courts, when necessary, may resort for the correction or elimination of erroneous words, for the supply of intended but omitted words, for the restriction of too general words, for the extension of too limited words, and for the substitution of proper for improper words. When once a rule of the Written Law has been judicially interpreted the *interpretation becomes binding* upon future causes arising under the rule in the same State, until the previous interpretation has been formally repudiated.

READ: 1 Bl. Com., pp. 87–91;
Rob. Am. Jur., §§ 293–303;
Black, Interpretation of Laws, §§ 7–69, 74–93, 100–122, 130–138, 142–145;
Wharton, American Law, §§ 604–630;
Barbour, Rights of Persons and Property, pp. 12–16, 33–43;
Dwight, Law of Persons and Property, pp. 29–39;
Clark, Elementary Law, §§ 55, 56;
Bishop, Written Laws, §§ 68–146, 188–253;
Dwarris on Statutes (Potter Ed.), pp. 47–51, 121–146;
Sutherland on Statutes (Lewis Ed.), §§ 358–640, 678–720.

§ 18. Of the Territorial Jurisdiction of Laws: Conflict of Laws.

The *political authority of a State* extends only to its own territory, and within that territory is exclusive of all other similar authority. Nevertheless, conditions created by the migration of people from one State to another, or by the political or commercial relations which unite the inhabitants of different States, compel one State to recognize and sometimes to *enforce the laws of other States*, by virtue of that comity of States without which international intercourse would be impossible. The principal occasion for the exercise of comity occurs when suits are brought in one State which involve rights, capacities, or obligations arising under the laws of other States. In such cases

the law of the State in which the suit is brought is called the "*Lex Fori*," and by this law all matters pertaining to the conduct of the suit itself are governed. The other laws which may be recognized and enforced are: (1) The *Lex Ligeantiæ*, or law of allegiance of one or more of the parties to the suit, by which various questions as to his legal capacity are determined; (2) The *Lex Domicilii*, or law of his domicile, by which questions as to his personal powers and responsibilities, his rights in movable property, and his domestic relationships are usually controlled; (3) The *Lex Rei Sitæ*, or law of the place where some object in controversy is situated, by which immovable property and all rights therein are governed; (4) The *Lex Loci Actus*, or law of the place where some action has been performed, by which the legality or illegality of the act, and its general legal effect, are ascertained; (5) The *Lex Loci Contractus*, or law of the place where the contract in controversy was made, by which the form, interpretation, and validity of that contract are decided; (6) The *Lex Loci Solutionis*, or law of the place where the contract in controversy was to be performed, by which questions as to the obligations and fulfilment of that contract are settled; (7) The *Lex Loci Pacti*, or law of the place which the parties have voluntarily adopted by agreement as the standard of their rights and duties, and according to which, therefore, their reciprocal obligations will be measured. Either of these laws may be substituted for the *Lex Fori*, and applied in its stead, whenever justice and the public policy of the State of the forum will permit.

Rem. Every State is its own judge as to the extent of its comity toward the laws of other States, and may enlarge or restrict its concessions at its pleasure. Ordinarily, no State will recognize foreign laws which are contrary to its standard of good morals, or its general ideas of public policy; but other laws, however different in spirit and in detail from its own, are usually accepted and enforced unless they relate to the prosecution and punishment of crime. On account of the legal collisions which are presented in such cases, and are avoided by these concessions, the doctrines on this subject are frequently grouped under the name of "*The Conflict of Laws.*" Because these conflicting laws are prescribed by distinct nations, and usually pertain to private interests, they are sometimes discussed as "*Private International Law.*"

READ: Rob. Am. Jur., §§ 191–203;
Wharton, American Law, §§ 261–357;
Walker, American Law, §§ 23, 303–308;
Story, Conflict of Laws, §§ 1–25, 33, 34, 38, 40–49, 51, 64–66, 69, 73, 93, 99–106, 108–113, 201, 202, 242, 263, 266, 270, 272, 376, 377, 382–385, 395, 396, 399, 424, 430, 431, 435, 447, 463, 465, 474, 481, 483;
Wharton, Conflict of Laws, §§ 1–4 *b*, 272–333, 353, 359–368, 372, 373, 393–404, 410–412, 415 *a*, 418–424, 427 *h*–427 *s*, 428 *a*, 439 *a*, 447 *a*, 467 *a*, 478 *c*, 554–587;
Rorer, Interstate Law, pp. 4–8, 45–53, 148–155, 167–170;
Barbour, Rights of Persons and Property, pp. 762, 763, 764–766.

§ 19. Of the Effect of Changes in the Law.

In the laws of every nation *changes become inevitable* by the repeal or modification of the old law or by the substitution or addition of the new. The effect of these changes upon the rights and duties of persons, and upon the legal character of acts and things, is governed by the following rules: (1) *Transactions commenced and completed* during the existence of a law remain valid and unchanged in spite of any alteration in the law; (2) *Transactions commenced but not completed* during the existence of a law vary with the changes in the law, and are governed by the law which is in force at their completion; (3) *Transactions invalid* under the law in force at their completion, on account of some merely formal defect, *may be made valid* by a later law; (4) The *incidental consequences* of a past and valid transaction change as the law changes; (5) *Vested rights of property* are not affected by changes in the law, but expectant and contingent rights are destroyed or modified with the alterations in the law under which they have arisen; (6) The *obligations of a valid contract* cannot be impaired by any subsequent legislative act; (7) *Ex post facto* enactments are invalid.

Rem. Thus, under the first rule, a marriage valid at the time of its occurrence is always valid; if defective in form only it may, under the third rule, be made valid by a subsequent law; if between the promise to marry and the actual marriage the law changes, the validity of the marriage is governed, under the second rule, by the later law; the incidental consequences arising from the marriage, such as the right to dower or to the custody of children, vary under the fourth rule with the changes in the law. A *vested right* is one which exists in a definite person, and now entitles him to possess and enjoy some object either at once

or in the future. An *expectant right* is one which though not now residing in a definite person, will if the law continues unchanged eventually vest in him. A *contingent right* is one which does not now, and except in certain future contingencies never will, vest in the particular person under consideration. Thus the owner of land has a vested right; his heir at law has an expectant right; the person who will have the land, if there should be no heirs, has a contingent right. The *obligation of a contract* includes the duty to perform the contract, and the duty to pay damages in case it is not performed. An *ex post facto law* is a law which makes an innocent past act a crime; or increases the guilt or the penalty of a past crime; or puts the criminal to a legal disadvantage which did not exist at the time the crime was committed.

READ: Rob. Am. Jur., §§ 204–210;
Cooley, Const. Law, pp. 312–314, 328–363;
Cooley, Const. Lim., pp. 264–294, 369–389;
Barbour, Rights of Persons and Property, pp. 763, 764;
Sutherland on Statutes (Lewis Ed.), §§ 283, 284, 641–677.

§ 20. Of the Proof of Laws.

All persons are conclusively *presumed to know* the Unwritten Law and the public statutes of the State in which they live. Hence judges, and other officers engaged in the administration of the law, are said to take *judicial notice* of its provisions; and in controversies carried on before the courts such laws require no proof. Private statutes, on the other hand, and the laws of foreign States must be alleged and proved like other matters of fact. Such proof may be afforded by the testimony of persons learned in the law, or by authenticated copies of the laws themselves.

Rem. Matters within the common knowledge of the people at large may well be supposed to be known to persons whose duty it is to interpret and apply the law; and to present evidence in reference to such matters would involve unnecessary trouble and expense. Consequently, in all legal proceedings they are considered as already before the court, and persons interested in them are expected to refresh their recollection concerning them in any ordinary method. This is the meaning of the rule requiring officers to take judicial notice of them, which is a rule relating to the production of testimony and forms a part of the Law of Evidence and Procedure.

READ: Rob. Am. Jur., §§ 211–213;
1 Greenleaf, Evidence, §§ 4–6;
Rorer, Interstate Law, pp. 110–123;
Sutherland on Statutes (Lewis Ed.), §§ 309–323.

§ 21. Of the Practical Application of Law.

The rules of law are applied to practical affairs through various agencies, of which the most prominent are the courts of justice. *Courts* are tribunals in which controversies concerning the meaning and effect of rules of law are determined, and by which the rules themselves are enforced. Courts in this country are of numerous classes, and of different grades of authority and jurisdiction. Every State has its own local system of tribunals, and the United States as a nation has another system, territorially coextensive with all the States but taking cognizance of controversies not within the ordinary jurisdiction of the local courts. Each of these systems, whether State or Federal, has at its head a Supreme Court, by which the decisions of inferior courts may be reviewed, and the precise limits of the rules of law may be finally determined. The inferior courts range from thence downward, through various ranks of dignity and power, to the petty tribunals of a local municipality or justice of the peace.

Rem. Other agencies engaged in the application of the law are the people who spontaneously obey it, and the legislative bodies and executive officers who formulate and administer it. The operation of these agencies is not invoked by controversies, like that of the courts, though it frequently gives rise to controversies which the courts alone can determine. The *classification of courts* is based sometimes on the subjects over which they exercise jurisdiction, — as into *Civil Courts*, which take cognizance of controversies between private persons; and *Criminal Courts*, before which parties are prosecuted by the State for crime. Another classification is derived from the modes of procedure, — like that between *Courts of Common Law*, in which the causes are conducted according to the ancient forms of the English customary law; the *Courts of Equity*, where a much simpler and in many cases a more effective method is observed; the *Courts of Admiralty*, where modes better adapted to maritime litigation are pursued; and the *Courts of Probate*, where proceedings, partly judicial, partly commercial, are applied to the settlement of estates. Other classifications are founded on the amount involved in the controversy, or on the territorial area within the jurisdiction of the court, or on the conclusiveness of its decisions. Every State adopts its own grades of classification for its courts, and gives them such names as it chooses. The Courts of the United States are: (1) The Supreme Court; (2) The Circuit

Court of Appeals; (3) The Circuit Courts; (4) The District Courts; (5) The Court of Claims; and (6) The Courts of the District of Columbia and the Territorial Courts.

READ: Rob. Am. Jur., §§ 304, 352–364;
Andrews, American Law, §§ 642, 643;
Clark, Elementary Law, §§ 248–264;
Rorer, Interstate Law, pp. 28–44.

§ 22. Of Persons: Natural Persons: Artificial Persons.

Laws proceed from and are directed to persons; rights inhere in and impose duties upon persons; and hence the definition of the word "person" expresses one of the primary and fundamental conceptions of the law. A *person* is a being capable of self-determination; a being endowed with reason and free-will; and thereby distinguished both from inanimate objects and from irrational animals. Persons, thus defined, are of two classes, — Natural and Artificial. A *natural* person is an individual human being. An *artificial* person is a natural person, or a group of natural persons, upon whom the State has conferred an artificial personality in order to enable it to perform acts or enjoy privileges which to merely natural persons might be impossible. An artificial person is more frequently called a "*Corporation.*"

Rem. Every person, natural or artificial, *has* in the eye of the law *three attributes* in addition to those which are included in the personality itself. These are: (1) A Name; (2) A Status; and (3) A Domicile. For most legal purposes the *name* is the person, and until the contrary is shown the identity of the person is presumed from the identity of name. Names are usually identical when they have the same sound, however they may be spelled; but in authoritative written documents the spelling is sometimes regarded as determining the name. The name of a natural person generally consists of a Christian name and surname, and may be given him by his parents, or adopted by himself, or bestowed on him by the law. The name of an artificial person is fixed by the State when creating it. The *status* of a person is his legal condition, as the State contemplates it when prescribing the law by which he is to be governed, and in view of which it defines his rights and prescribes his duties. The status of all sane adults who are free from external coercion is practically the same; and since these constitute the great body of the people in a State the general laws are made to suit their condition, and their status is said to be *normal.* The status of persons for whom exceptional

laws, or exemptions from general laws, must in justice be made is called *abnormal.* Natural persons of abnormal status are: *a.* Infants; *b.* Insane Persons.; *c.* Persons under Coercion or Duress; *d.* Married Women; *e.* Public Officers; *f.* Aliens; *g.* Indians; and *h.* Slaves. The status of artificial persons is always abnormal. The *domicile* of a person is that particular locality where he has his legal home, and by whose laws his political and many of his personal rights are governed. The domicile of a natural person usually follows that of his father; of a married woman that of her husband. A person of normal status may change his domicile by removing to a different locality with the intention to make it his legal home. The domicile of an artificial person is the State by whose act it was created.

READ: Rob. Am. Jur., §§ 16–70, 77–79;
Wharton, American Law, §§ 254–260;
Barbour, Rights of Persons and Property, pp. 56–86;
Dwight, Law of Persons and Property, pp. 2, 3, 119–140, 284–312;
Walker, American Law, § 20;
Andrews, American Law, §§ 37–60;
Clark, Elementary Law, §§ 60, 61, 176–188;
Wharton, Conflict of Laws, §§ 20–91, 105;
Jacobs, Law of Domicile, §§ 25–59, 65, 70–78, 104, 105, 121–125, 134, 135, 137–143, 150–154, 161, 162, 175, 177, 179–188, 201, 204, 208, 209, 214, 215, 222, 229, 235, 238, 244 *a*–249, 260, 264 325, 362–366, 401, 402;
2 Greenleaf, Evidence, §§ 278 *a*–278 *h*, 301, 302, 362–374.

§ 23. Of the Distinguishing Characteristics of Artificial Persons.

An artificial person, or corporation, is distinguished from a natural person by four essential attributes: (1) *It comes into existence,* or ceases to exist, by the fiat of the State and not by natural generation, decay, and death; (2) It is *intangible,* having no physical body through which it acts or can be acted upon; (3) It is *immortal,* continuing to exist during the period prescribed by the State, independent of the life or death of the natural persons of whom it is composed; (4) It is a *unit, or single personality,* no matter how numerous may be its members, and possesses and enjoys its own legal rights of person and property entirely distinct from theirs.

Rem. Several forms of associations are known to the law which, though not true corporations, in some respects resemble them. Among these are Quasi-Corporations, Voluntary Associations, and Joint-Stock Corporations. A *quasi-corporation*

is a group of persons which has, for so long a time, exercised corporate powers without any direct authority from the State that the State deems it expedient to recognize it as a corporation, to the extent manifested by its previous corporate acts. Such corporations are generally of a public character, whose past acts could not be called in question without prejudice to the State. A *voluntary association* is a group of persons who have engaged in a common enterprise without being incorporated, and under circumstances which show that they did not intend to form a partnership. Many religious, literary, and benefit associations are of this class. Their legal character is somewhat doubtful, but their individual members are usually held responsible for all those acts of the association in which they personally participate. A *joint-stock corporation* is, under the laws of some States, a true corporation receiving its peculiar name to distinguish it from charitable and other civil corporations which do not issue stock or engage in general business operations. Under the laws of other States this name is given to commercial associations created under special laws which confer upon them certain corporate powers, and relieve them from the liabilities which attach to a mere partnership. The State itself may also *act in a corporate capacity*, and as such may own private property, make lawful contracts, and incur the same obligations as other artificial persons.

READ: Rob. Am. Jur., §§ 71, 80, 83, 86, 87, 112;
Barbour, Rights of Persons and Property, pp. 54, 55;
Dwight, Law of Persons and Property, pp. 350, 351;
Walker, American Law, § 90;
Andrews, American Law, §§ 416–420, 423;
Clark, Elementary Law, §§ 237–239;
Morawetz on Corporations, §§ 1, 6, 7, 474–477, 922, 923, 939–943, 1044–1052;
Clark on Corporations, §§ 1–3, 9, 11, 73–81, 246–255;
Clark and Marshall on Corporations, §§ 1–7, 17–26;
Thompson on Private Corporations, §§ 1–12, 31, 2765–2779;
Beach on Private Corporations (Purdy Ed.), §§ 1–8, 538–541, 1361–1396, 1403, 1411, 1415–1423.

§ 24. Of the Creation and Powers of Artificial Persons.

An artificial person is *created* by a fiat of the State, expressed either in a direct legislative enactment, called a "charter," or in a public law authorizing the issue of a charter by some designated officer to any group of persons who may comply with the provisions of the law. By this charter, taken in connection with the laws of the State governing corporations, *the powers* which the corporation is to be allowed to exercise are also conferred;

and any act of the corporation beyond these powers is *ultra vires*, and without authority. Of such acts the corporation itself can take no advantage, nor can outside parties base any claim upon them except in cases where to deny the claim would operate as a fraud upon the claimant. The charter of a corporation is *interpreted strictly* in favor of the public, and hence clothes the corporation with no rights which it does not verbally express or necessarily imply. Among the *rights enjoyed* by every corporation are: (1) The right to act by majority vote; (2) The right to act through agents duly appointed; (3) The right to make by-laws for its own government; (4) The right to have a common name and a common seal; (5) The right to acquire, hold, and dispose of the property which may be needed for the exercise of its charter powers; (6) The right to make and perform contracts within the limits indicated by its charter; (7) The right to sue and be sued. The *death of a corporation* may occur through the surrender of its charter by the corporators to the State, or through the forfeiture of its charter by the corporation by the non-use or misuse of its powers, or through the repeal of its charter by the State either by a new legislative enactment or by a proceeding in a court of law.

Rem. A corporation which, having a legal right to exist, has complied with all the conditions prescribed by law as to the mode of its creation is known as a *corporation de jure*. A *corporation de facto* is a corporation which, having a legal right to exist, has embarked on its corporate enterprise without having complied with every formal condition prescribed by law as to the mode of its creation. Of this defect, however, no one can take advantage except the State itself; and as between the corporation and outside parties its acts within its charter powers are as valid as if its organization had been in complete conformity to law. There can be no corporation *de facto* unless it could have been a corporation *de jure*.

READ: Rob. Am. Jur., §§ 72–76, 81, 82, 84, 85;
Dwight, Law of Persons and Property, pp. 354–405;
Walker, American Law, §§ 91, 93, 94;
Andrews, American Law, §§ 424–432, 451;
Clark, Elementary Law, §§ 237–239;
Metcalf, Contracts, pp. 181–186;
Morawetz on Corporations, §§ 8–44, 316, 318, 325–366, 392, 411, 491, 492, 575–581, 618–620, 641–654, 735–737, 744–755, 776–778, 1002–1004;

Clark on Corporations, §§ 4, 5, 6–8, 12–45, 49–72, 82–85;
Clark and Marshall on Corporations, §§ 8–16, 37–69, 80–97, 123–131, 204–257, 268–283;
Cook on Corporations, §§ 1–6, 15 *b*, 667–682;
Thompson on Private Corporations, §§ 35–42, 50–60, 145, 146, 160–163, 170–174, 178, 181, 198, 200, 201, 205, 210–212, 225–259, 265–267, 271, 274, 297, 310, 312, 331–333, 965;
Beach on Private Corporations (Purdy Ed.), §§ 34–40, 46–49, 55, 60, 61, 69, 72, 75, 96, 102–104, 106, 118–125 *f*, 142–149, 819–822, 887–896, 902, 922, 923, 958–961, 1015–1017, 1032, 1246–1249, 1262–1269, 1292–1328;
Wharton, Conflict of Laws, §§ 105 *a*–105⅛.

§ 25. Of the Classes of Artificial Persons.

Artificial persons are of various classes: (1) Sole or Aggregate; (2) Public, Quasi-Public, or Private; (3) Eleemosynary or Civil. A *corporation sole* is composed of one natural person and his individual successors, such as the bishop of a diocese or a superintendent of highways. A *corporation aggregate* is composed of two or more natural persons at the date of its creation, and remains an aggregate corporation though the number of its members be subsequently reduced to one. A *public corporation* is a political body, established by the State for political purposes, exercising within a designated territory certain legislative, judicial, and executive functions, and having power to hold the property and transact the business necessary to the performance of its public duties. Such are counties, cities, boroughs, and incorporated towns and villages. A *private corporation* is created for the promotion of some enterprise in which its individual members are directly or officially interested. A *quasi-public corporation* is a private corporation whose corporate enterprises are so beneficial to the public as to induce the State to clothe it with extraordinary powers such as the State alone can generally exercise, — as, for example, the power to take private property for its use against the will of its owner. Railroad, canal, turnpike, ferry, and bridge companies are usually *quasi*-public corporations. An *eleemosynary corporation* is a private corporation created for charitable purposes. It receives and holds its powers and property in trust for its designated beneficiaries, and will be compelled by a court of equity to discharge its duties in their favor. Orphanages, asylums, educational and religious institutions are examples of this class of corporations. A *civil corpora-*

tion is a private corporation created for the benefit of its members, and to promote their spiritual, intellectual, bodily, or financial interests. Of civil corporations there are many species; that which commands the most attention from the courts, at the present day, being the stock corporation. A *stock corporation* is a financial enterprise designed to increase the fortunes of its members by engaging in some joint commercial operation. In such corporations each of the members subscribes for a certain number of shares into which the proposed capital is divided, and thereby becomes liable to contribute the amount of the prescribed or par value of such shares toward the payment of the corporate obligations. These shares represent the interest of the subscriber in the corporate enterprise, and are transferable by assignment like other rights of property.

Rem. The legal importance of the rights and liabilities of corporations has increased so rapidly, in the past fifty years, as now almost to overshadow that of the rights and liabilities of natural persons; and the statement and application of the law relating to them forms one of the principal duties of our courts and legislatures. The subject is pregnant with many difficulties, and demands a most conservative and cautious handling from all persons in authority, lest economic progress should be hindered by the vain attempt to make new phases of social life conform to old ideas of practical justice and equality.

READ: 1 Bl. Com., pp. 467–485;
Rob. Am. Jur., §§ 88–111;
Barbour, Rights of Persons and Property, pp. 55, 56;
Dwight, Law of Persons and Property, pp. 351–353, 405–413;
Walker, American Law, §§ 92, 93, 95;
Andrews, American Law, §§ 364–415, 422, 433–450;
Clark, Elementary Law, §§ 237–239;
Morawetz on Corporations, §§ 2–5, 109, 128, 159, 228, 235–237, 435, 438, 445, 779–781, 818–821;
Clark on Corporations, §§ 10, 86–245;
Clark and Marshall on Corporations, §§ 70–79;
Cook on Corporations, §§ 7–15 *a*;
Thompson on Private Corporations, §§ 13–34;
Beach on Private Corporations (Purdy Ed.), §§ 9–33, 126, 127, 183–188, 302–308, 343, 346, 347, 349–352, 368, 371–381, 399, 400, 409, 433–442, 576–586, 598;
Smith, Personal Property, §§ 134–137;
Boone, Real Property, § 11.

§ 26. Of Things.

A *thing* is a being devoid of personality. Every object of which the law can take notice, except persons either natural or artificial, is therefore a thing. Things are divided into several classes: (1) Corporeal or Incorporeal; (2) Movable or Immovable; (3) Personal or Real. *Things corporeal* are those which are tangible and can be physically occupied by man, like houses or lands; or can be delivered by one person to another, like cattle or furniture. *Things incorporeal* are those which cannot be handled or occupied or delivered, such as the unconfined forces of nature, the ideas of the human mind, the powers of corporations, or rights arising out of contract or the family relations. *Things movable* are those which can be removed from one place to another without losing their identity, and are said to follow the person of the owner wherever he goes. *Things immovable* are those which are permanently attached to one locality, or which can be removed therefrom only by their disintegration or destruction. Under certain circumstances things which are naturally movable are regarded by the law as immovable; as where portable materials are so annexed to land as to become legally inseparable from it. *Things personal* are those which are governed by the law of personal property in reference to their mode of transfer from one person to another, and to the remedies provided by the law for wrongs by which the rights of their owner in them have been violated. *Things real* are those which are governed, in reference to the same subjects, by the law of real property.

Rem. As a person, natural or artificial, is in the eye of the law precisely what the law defines him to be, so a thing, both in itself and in its relations to persons and to other things, agrees with the legal definition given to it by the State, even though its natural characteristics are thereby ignored. Thus the same object, being governed in one place or under one set of circumstances by one body of law, and in a different State or under other circumstances by another body of law, may be in turn movable and immovable, personal or real. A slave, for example, before the Civil War, was in some States a person and in other States a thing. So money, which is by nature personal and movable, if given in trust to be invested in land, thereby though still money becomes real; and land, which is in itself real and im-

movable, if devised to be sold and the proceeds expended for a special personal purpose becomes immediately personal. This rule is called the doctrine of "*Equitable Conversion.*"

READ: 2 Bl. Com., pp. 16, 17, 20, 384–388;
Rob. Am. Jur., §§ 113–118;
Barhour, Rights of Persons and Property, pp. 90, 91, 299, 300;
Walker, American Law, § 21;
Andrews, American Law, §§ 518–532;
Clark, Elementary Law, §§ 64, 69, 70;
Smith, Personal Property, §§ 3, 6–8, 138–140;
Brantly, Personal Property, §§ 2, 7;
Pingrey, Real Property, § 16;
Kerr, Real Property, §§ 2, 79, 80, 103;
Rice, Real Property, § 13;
Kirchwey, Readings on the Law of Real Property, pp. 1–11;
Warvelle, Real Property, pp. 1, 2;
Boone, Real Property, §§ 10, 11, 347 *d*;
Tiffany, Real Property, §§ 1–3, 103–109.

§ 27. Of the Fundamental Divisions of the Law.

Rights inhere in persons as against other persons, and are exercisable over persons and things. As persons are public or private, rights also are public or private; and the law which asserts or vindicates them is therefore public or private. Hence in classifying the law into its great fundamental divisions the most natural arrangement distributes the whole body of the law into four parts:

I. The Law of Private Rights.
II. The Law of Private Wrongs and Remedies.
III. The Law of Public Rights.
IV. The Law of Public Wrongs and Remedies.

To the statement and explanation of the principal rules of law which are contained in each of these divisions, a separate Book of this treatise will now be devoted.

BOOK I

OF THE LAW OF PRIVATE RIGHTS

§ 28. Of the Species of Private Rights.

Private rights are those which private persons possess as against other private persons. They are divisible according to the object of the right into three classes: (1) *Personal Rights*, or the rights which every person has in, to, and over his own person; (2) *Property Rights*, or the rights which every person has in, to, and over his own property; (3) *Family Rights*, or the rights which every person has in reference to the persons and property of the members of the family to which he belongs. Under these three heads all private rights can be grouped; and in this order they will hereafter be discussed.

Rem. Private rights are sometimes divided into absolute and relative rights. *Absolute rights* are said to be those which belong to man whether out of society or in it, including the rights of person and property. *Relative rights* are said to be those which belong to man as a member of society, and occupying certain relations toward other men. This classification is defective, inasmuch as many property rights, especially those founded on contract, are relative not absolute. It is also based upon a theoretical condition of the owner of the right since every person, whose rights the law protects, is necessarily a member of society, and his most absolute rights are qualified by his relations toward his fellowmen. The classification adopted in the text, being founded on the objects of the rights which in their nature and the modes of their enjoyment are defined and prescribed by law, is to be preferred because its divisions are stable, and the rules which govern them are permanent and intelligible.

READ: 1 Bl. Com., pp. 121–129;
Barbour, Rights of Persons and Property, pp. 95–98;
Dwight, Law of Persons and Property, p. 45.

CHAPTER I

OF PERSONAL RIGHTS

§ 29. Of the Nature and Divisions of Personal Rights.

Personal rights are the rights which every man has in, to, and over his own person. They include: (1) The right to the full and complete *existence* of his person according to its nature, uninterfered with by the wrongful conduct of other men; (2) The right to *act or forbear* according to the capacity of his person within the limits fixed by reason and justice, unrestrained by any exterior authority except that of the State. The first of these rights is called the Right of Personal Security. The second is known as the Right of Personal Liberty.

Rem. The person of a man comprises his physical body and his intellectual soul; and his right to his person is his right to both of these in their combined condition, and to all the faculties by which they act and interact upon one another. Naturally, the physical body being the visible and tangible portion of this combination and the means by which the person acts or is acted on by other men, it is the object of the law's principal solicitude; and the right to its security and freedom is asserted and protected by many definite rules. The intellectual soul, the seat of emotions as well as ideas, being more incomprehensible in essence and attributes and affected in many mysterious ways, is rarely noticed by the law except when its operations are disturbed by some wrong inflicted on the body. Thus it is a common doctrine that no action will lie for mental sufferings alone, or for the mere perversion of the intellect by falsehood which is in itself one of the most serious of injuries; although to wound the feelings by an attack upon the body, or upon the reputation of the person as a whole, is a grievous legal wrong.

READ: 1 Bl. Com., pp. 125–129;
Cooley, Const. Law, pp. 246, 247;
Walker, American Law, § 268;
Andrews, American Law, §§ 454–459;
Clark, Elementary Law, §§ 62, 63.

SECTION I

OF THE RIGHT OF PERSONAL SECURITY

§ 30. Of Personal Security.

Personal security includes immunity against direct physical attacks upon the body, and indirect deleterious influences upon its health and comfort, or upon the enjoyment of that esteem and consideration among men which is essential to the perfection of a social being. Hence *the right of personal security* has been defined as "that right which every man possesses to the legal and uninterrupted enjoyment of his life, limbs, body, health, and reputation." This right is not originally conferred by law, but is inherent and inalienable. It is the most sacred of all rights, and any serious violation of it merits and should receive the severest punishment.

Rem. This right lies at the foundation of all other personal rights, and in a certain sense includes and necessitates the rest; since the enjoyment of life, limbs, body, health, and reputation is the enjoyment of all that goes to make up the entire concrete personality of every individual. Whatever, therefore, interferes with this enjoyment, though never hitherto named as a wrong against personal security, is an infringement of this right and is forbidden by the law.

READ: 1 Bl. Com., pp. 129–134;
2 Kent Com., Lect. xxiv, pp. 12–26;
Barbour, Rights of Persons and Property, pp. 99–102;
Andrews, American Law, §§ 460, 461.

§ 31. Of the Right to Life.

A natural person *comes into complete legal being* when he is fully born; that is, when his body has been separated from the body of his mother and he has begun to enjoy an independent existence of his own. A natural person *ceases to exist*, in the eye of the law, when he is physically dead. Between the instant of his birth and that of his death he has a right to continue to live, and is presumed by law to be about to live indefinitely, however great may be the probability that he will soon expire.

Rem. The doctrine that the legal existence of natural persons begins at birth and terminates at death is subject to several quali-

fications. *First*, in dealing with property questions the law takes notice of the existence of an unborn child even from the *moment of its conception*, and asserts its rights as an heir or devisee, and will appoint a guardian to protect its interests. *Second*, A child which *dies after its birth* from violent injuries, received by it while in the womb of its mother, is regarded by the law as having been killed by the person who inflicted the injuries. In both these cases, however, it is essential that the child be subsequently born alive, since if it be *born dead* its imputed rights lapse into oblivion. Again, in reference to the duration of life, the law sometimes considers as *already dead*, — *First*, persons who are *not known to be alive* but whose age, if they were living, must far exceed the customary limit of human existence; *Second*, persons who have been *absent from home* and friends for a long period, — usually seven years or over, — and have not meanwhile been heard of; *Third*, persons who, on account of crime, have incurred the penalty of *civil death* and have thereby forfeited, wholly or in part, their right to legal recognition.

READ: 1 Bl. Com., pp. 130, 132, notes;
Rob. Am. Jur., §§ 17, 18;
Barbour, Rights of Persons and Property, pp. 102, 103.

§ 32. Of the Right to Limbs and Body.

The limbs and body, taken together, constitute the physical organism in which the soul resides. The *body* is that portion of the organism which lies between the upper part of the hips and the neck, not including the arms. The remaining portions of the organism are the limbs. The *limbs* are the members useful in labor to sustain the body, and in fighting to protect it, and on this account are regarded by the law as of greater consequence than the body. The right to the enjoyment of the limbs and body is the right to possess them in peace, not only free from wrongful invasion but free from the fear of it; and hence the law prohibits any interference, by threats or otherwise, with that feeling of security concerning them to which their owner is entitled. Even where their owner consents in advance to an infringement of this right, as by agreeing to fight with an adversary, this does not justify or excuse the infliction of a serious physical injury upon him.

Rem. Great importance formerly attached to the limbs as the natural instruments of self-defence, and any injury which

impaired their value for this purpose, or diminished the warlike energy and courage of their owner, was not only a grievous civil wrong but the most heinous crime of *mayhem*. The limbs were then particularly enumerated, and included the arms, legs, eyes, front teeth, and the male organ of generation. Under our present law the disfigurement of the person by injuries which do not affect the fighting powers has obtained an almost equal consequence, even when such injuries are confined to the region called the body.

READ: 1 Bl. Com., p. 130;
3 Bl. Com., p. 121;
4 Bl. Com., pp. 205–208;
Barbour, Rights of Persons and Property, pp. 104, 105;
Dwight, Law of Persons and Property, pp. 77–79.

§ 33. Of the Legal Protection of Life, Limbs, and Body.

The *law protects* life, limbs, and body (1) By giving to every person the right of *self-defence;* (2) By declaring that all promises and conveyances, extorted by fear of bodily injury, shall be void because of the *duress;* (3) By providing various public means for their *support or protection*, such as almshouses, hospitals, and police regulations; (4) By its *educative influence* upon the people at large, compelling them to observe habits of peace and order; (5) By affording preventive, compensatory, or punitive *remedies* for their actual or threatened violation.

Rem. The right of *self-defence* here mentioned is the right to meet aggressive force against the person with a force sufficient to repel it; even, when necessary, to the taking of the life of the assailant. *Duress* is the coercion of the will of one person by the wrongful exercise of power or control over him by another. This may be effected by violence or threats against security or liberty, or by the unlawful injury or appropriation of property. An *act void* for duress may be *made valid* by ratifying it after the duress has ceased. *Police regulations* for the preservation of the peace and the protection of the person extend to all forms of action or forbearance by which this right might be invaded, and are as effective as the state of current public opinion will permit. And where injuries to them do occur the remedies provided by the law are ample if the sufferers pursue them with energy and perseverance, and the officials to whom their application is entrusted perform their legal duties.

READ: 1 Bl. Com., pp. 130, 131, 359–365;
3 Bl. Com., pp. 3, 4, 120–122;
Rob. Am. Jur., §§ 44, 45.

§ 34. Of the Right to Health.

Health is that condition of the living body in which it is free from disease, pain, weakness, and discomfort. The *right to health* is thus the right of one person not to be subjected, through the wrongful actions or forbearances of other persons, to any influences which either impair his physical energies or even render him bodily uncomfortable. Of purely mental suffering or discomfort the law takes no notice unless it is produced by agencies which act primarily upon the body.

Rem. The scope of the right to health is manifested more clearly in the acts which have been treated by the courts as violations of the right than in its definition. Thus the ringing of church or factory bells at unseasonable hours; the bleating of animals confined in pens awaiting slaughter; the emanation of offensive smells from the operations involved in lawful trades; the adulteration of articles of food with foreign and innocuous ingredients, have been regarded as injuries to health though not resulting, so far as ascertainable, in any real bodily harm to the complainants.

READ: 3 Bl. Com., p. 122;
Barbour, Rights of Persons and Property, p. 105;
Dwight, Law of Persons and Property, pp. 79, 80.

§ 35. Of the Legal Protection of Health.

The law *protects health*: (1) By giving to every person, whose health is endangered by objects or agencies unlawfully created or maintained by any other person, the *right to abate* or remove them peaceably and without unnecessary damage; (2) By *suppressing through the police powers* of the State all influences by which health is imperilled; (3) By affording to the injured or threatened party prompt and efficient *remedies* for the prevention or removal of the evil, and the punishment of those who caused it.

Rem. An object or agency which is a menace to health is called a *nuisance*, and the peaceable *abatement of a nuisance* by the injured party is one of the oldest remedies known to our law. The necessity of applying it, however, has been much diminished by the enlargement of the sphere of the preventive remedies obtainable in courts of equity. The principal field for the exercise of the *police powers* of a State is in the protection of health. To

this end elaborate systems have been organized, and officers appointed with almost unlimited authority, to enforce the numerous sanitary regulations now imposed upon the people. Stringent as many of these regulations are the most severe of them, when submitted to the judgment of the courts, have been sustained.

READ: 3 Bl. Com., p. 5;
4 Bl. Com., pp. 161, 162.

§ 36. Of the Right to Reputation.

The *reputation* of a person is that favorable opinion which other persons entertain concerning his character and capabilities. It is on this favorable opinion that the social standing of a person and consequently the value of all business and other personal relations, ultimately depends; and its importance is universally considered as transcending that of all forms of property, if not also that of liberty and life itself. The right to enjoy it undiminished by the wrongful misrepresentations of other persons is, therefore, of high estimation in the law, and jealously guarded against all forms of infringement.

Rem. Reputation relates not only to moral character and integrity of conduct, but to physical and mental capabilities. Thus it is an injury to reputation to say that an attorney is ignorant, a physician unskilful, an artisan incompetent or careless; and if such statements cause pecuniary loss and are not justified by the occasion, the utterer is liable in damages.

READ: 1 Bl. Com., p. 134;
1 Kent Com., Lect. xxiv, pp. 16–19;
Barbour, Rights of Persons and Property, pp. 105–108.

§ 37. Of the Legal Protection of Reputation.

The law *protects reputation:* (1) By presuming that every person is of normal character and capabilities, and performs all his duties according to law and to the approved customs of business or society; (2) By affording to every person whose reputation is unlawfully attacked a remedy in damages through the courts of law; (3) By punishing serious attacks upon it as crimes.

Rem. The presumption of law in favor of reputation is usually expressed in the maxim, "Every person is presumed to be innocent until he is proved to be guilty." This maxim does not, however, exhaust the presumption which extends to every phase

of character and conduct, and regards every man as equal in all respects to ordinary men in general until the contrary is demonstrated.

READ: 3 Bl. Com., pp. 123–127;
4 Bl. Com., pp. 150, 151;
Dwight, Law of Persons and Property, pp. 80–94.

§ 38. Of Legal Limitations on the Right of Personal Security.

The right of personal security is subject to the *following limitations:* (1) The right of the State to inflict corporal, even capital, punishment for crime; (2) The right of the State to imperil the lives, limbs, and bodies of its subjects in wars of offence or defence or in suppressing public disorders; (3) The right of public officers to wound or kill a fleeing or escaping felon who cannot be otherwise apprehended; (4) The right of the State to protect the public health by sanitary regulations which expose individuals to the risk of infection or disease; (5) The right of a husband to control his wife, and of a parent or schoolmaster to chastise a child or pupil; (6) The right of any person to beat, wound or kill in self-defence; (7) The right of a landholder to eject a trespasser who refuses to depart.

Rem. The safety of the people being the highest law, all individual rights must yield when they come into collision with the welfare of the State; of which the State alone can be the judge. Hence the most sacred of all personal rights, as well as mere property rights, are held and enjoyed subject to such restrictions and burdens as the State, in the interest of the whole people, may see fit to impose. The individual has no alternative but to submit.

READ: 1 Bl. Com., pp. 408–412, 444, 445, 452, 453;
4 Bl. Com., pp. 7–19;
1 Kent Com., Lect. xii, p. 262; Lect. xxiv, pp. 13, 14.

SECTION II

OF THE RIGHT OF PERSONAL LIBERTY

§ 39. Of Personal Liberty.

Personal liberty consists in the entire freedom of a person to act or to forbear. The *right of personal liberty* is the right to enjoy this freedom, subject to no restraint except that which the State imposes for the public good. It includes (1) The right of *locomotion*, or the right to go or remain as the person pleases;

(2) The right to engage in any lawful *occupation;* (3) The right to enter into any lawful *contract;* (4) The right to *sue and testify* in the courts; (5) The right of *religious liberty;* (6) The right of *free speech;* (7) The right of *political equality* to other persons of the same status; (8) The right to *privacy.*

Rem. The right of personal liberty is antecedent to all law. It is inherent and inalienable, and cannot be destroyed or infringed even with the consent of its possessor, though its enjoyment may be temporarily suspended by contract; neither can the State entirely abrogate it except as a punishment for crime. Moreover, the view which the law takes of the scope and content of this right is gradually extending, and it now embraces several ingrediental rights which formerly were not noticed by the law.

READ: 1 Bl. Com., p. 134;
4 Bl. Com., pp. 151–153;
1 Kent Com., Lect. xxiv, pp. 34–37;
Cooley, Const. Law, pp. 224–267;
Barbour, Rights of Persons and Property, pp. 108–126;
Andrews, American Law, §§ 462, 468–472.

§ 40. Of the Legal Protection of the Right of Personal Liberty.

The law *protects* the right of *personal liberty:* (1) By forbidding any interference with the freedom of a person in any manner or degree, except by due process of law; (2) By treating unlawful restraints upon liberty as a species of duress, and holding void all acts or contracts made under its influence; (3) By recognizing the right of any person, who is unlawfully confined, to use any force that may be necessary in order to escape; (4) By according to every person lawfully confined, except in pursuance of the judgment of a court or while held for trial in a capital case where the proof is evident or the presumption great, the right to be released on reasonable bail; (5) By giving to every person whose liberty is restrained the right to have the legality of the restraint investigated on a Writ of Habeas Corpus; (6) By affording to the injured party compensatory and preventive remedies for past or threatened invasions of this right; (7) By punishing the more serious violations of the right as crimes; (8) By providing methods in which the validity and constitutionality of laws restricting liberty can be submitted to the judgment of the courts of last resort.

Rem. *Due process of law* is the regular procedure established by the State for the examination and determination of questions of fact and law. It differs in different species of cases, and in the same species at different periods. But without the institution and completion of the procedure, required by the current law in the same species of cases, no person can be lawfully subjected to any invasion of his private or public rights.

READ: 1 Bl. Com., pp. 135–138;
3 Bl. Com., pp. 127–138;
4 Bl. Com., pp. 218, 219;
1 Kent Com., Lect. xxiv, pp. 26–34;
Cooley, Const. Law, pp. 241–246, 326;
Dwight, Law of Persons and Property, pp. 94–103.

§ 41. Of the Legal Limitations on the Right of Personal Liberty.

The right of personal liberty is subject to the *following limitations:* (1) The right of the State to compel its subjects to render service to the public, when necessary, as soldiers, mariners, peace-officers, jurymen, witnesses, and in other capacities, either with or without compensation; (2) The right of the State to arrest and hold persons accused of crime, and if found guilty to punish them by imprisonment; (3) The right of the State to detain the infected, the insane, the helpless, and other dangerous persons in the interest of the public health and safety; (4) The right of the State to prevent persons, who may be needed as witnesses or parties in expected litigation, from going outside its territorial jurisdiction; (5) The right of the State to seize and detain fugitive criminals from other States, and deliver them to the State from which they fled, in order that they may there be punished for their crimes.

Rem. Personal liberty, like personal security, is always subordinate to public necessity. The individual concedes this by living in society; and the sacrifices he makes for the common good are the price he pays for the privilege of human companionship and the protection of human laws. That the burdens are too often unfairly distributed is true; but this is a defect in the expression or the administration of the law, and not an error in its principles. Even he who suffers most severely is better off than if deprived of the social benefits which his sufferings help to secure.

READ: 1 Bl. Com., pp. 343, 408–421;
3 Bl. Com., pp. 287–290, 354, 369;
Dwight, Law of Persons and Property, pp. 103–116.

CHAPTER II

OF PROPERTY RIGHTS

§ 42. Of the Right of Property.

The right of property is the right which every person has to acquire, enjoy, and dispose of property, subject to no control save that of the law. The right to *acquire property* is one form of the right of personal liberty. The right to *dispose of property* by abandoning it to the public is another form of the same right. The right to *enjoy property* when acquired is a right born of natural justice. The right to *dispose of it* to particular individuals, or for particular purposes, is conferred and regulated by law.

Rem. Personal liberty, as has been already shown (§ 39), embraces the right of a person to devote his energies to any lawful occupation, and by necessary consequence to receive the results thereof. But no person can be obliged to retain such results against his will, for this would place restrictions on his liberty. Thus the acquisition and abandonment of property may be identified entirely with the exercise of personal liberty. The enjoyment of property, however, by one person requires forbearance on the part of others, and this though dictated by reason and justice cannot be enforced except by law. Hence the right to enjoy property is, in part at least, of legal origin. So also as the disposition of property to particular persons or for particular purposes is not effective unless the law affirms the disposition, and protects them in the enjoyment of its benefits, this right is a creature of the law.

READ: 1 Bl. Com., pp. 138–140;
2 Bl. Com., pp. 1–14;
2 Kent Com., Lect. xxxiv, pp. 317–328;
Barbour, Rights of Persons and Property, pp. 86–89;
Dwight, Law of Persons and Property, pp. 415–417;
Walker, American Law, § 268;
Brantly, Personal Property, § 1;
Smith, Personal Property, § 1.

§ 43. Of Property.

Property includes whatever is capable of being exclusively possessed and enjoyed by man, whether it be corporeal or incorporeal, movable or immovable. Some objects, like the oceans or the atmosphere, are incapable of such control and consequently belong to nobody. Other objects, like flowing water or captured wild animals, are susceptible to control for the time being only, and while such control lasts they belong to their possessor. Still other objects, like land, furniture, or clothing, are capable of complete and permanent control, and are always property.

Rem. In a certain sense the oceans, the atmosphere, and the unconfined forces of nature may be said to belong to man, inasmuch as they are part of the earth which he inhabits, and are necessary for his use. But this does not make them property, for neither individually nor collectively can he acquire them nor dispose of them, however extensively he may enjoy them. His dominion over them is political rather than proprietary, and his control terminates with the regulation of their use. But separate portions of them, when confined, may come transiently under his dominion, and like running water or captured wild animals be his while he has them; ceasing to be property when they escape from his control.

READ: 2 Bl. Com., pp. 14, 15, 391–395;
1 Kent Com., Lect. ii, pp. 26–29;
Woolsey, International Law, §§ 59, 60;
Barbour, Rights of Persons and Property, pp. 89, 90, 284;
Dwight, Law of Persons and Property, pp. 418, 421, 422;
Walker, American Law, § 129;
Smith, Personal Property, § 2;
Kerr, Real Property, § 1.

SECTION I

OF PROPERTY RIGHTS IN GENERAL

§ 44. Of the Species of Property Rights.

Property rights, or rights *to* property, are of three species: **(1)** The right of naked possession; (2) The right of possession; and (3) The right of ownership. The *right of naked possession* is the right which every person, who is in the actual possession of an object has to retain that object in his possession against all the

world except the true owner or the rightful possessor. The *right of possession* is the right which a person may have to the immediate possession and enjoyment of an object as against all the world. The *right of ownership* is the right which a person may have to perpetual and exclusive dominion over an object, subject only to the outstanding rights which the owner has himself voluntarily created in that object in favor of other persons. The right of ownership may or may not be coupled with the right of possession. The right of possession may or may not be accompanied by actual possession.

Rem. The right of naked possession, sometimes called the right to *custody*, may originate either in a rightful or a wrongful act on the part of the possessor. Thus a servant having charge of his master's goods, the finder of lost property, the thief retaining the booty in his hands, all alike enjoy this right and can enforce and protect it in the same legal methods. This right is recognized by law, not so much for the benefit of the possessor as for the sake of peace; and therefore, until the true owner or the lawful possessor interferes, it maintains the right of the actual possessor to the property, — from which rule comes the maxim that "*possession is nine points of the law.*" The right of possession, on the other hand, always originates in a lawful act, and is derived from the right of ownership residing either in the possessor or in some other person who has conferred upon him the possessory right, — as in the case of a tenant of land or a borrower of goods.

READ: 2 Bl. Com., pp. 195–199;
Markby, Elements of Law, §§ 307–310, 347–399;
Holland, Jurisprudence, pp. 139–152;
Barbour, Rights of Persons and Property, pp. 283, 284, 549–552;
Clark, Elementary Law, §§ 65–67;
Kirchwey, Readings on Law of Real Property, pp. 461–466;
Warvelle, Real Property, pp. 15–26.

§ 45. Of the Legal Protection of Property Rights.

The law *protects property* rights: (1) By giving to every possessor of property the right to *defend* it by force from the more serious wrongful violent attacks; (2) By giving to every person, whose property has been wrongfully taken from him, the right peaceably to *recapture* it from the offender; (3) By establishing *police regulations* in favor of property, and organizing executive departments to enforce them; (4) By providing private *remedies* in the courts to prevent apprehended, or compensate for past,

violations of these rights; (5) By punishing grievous and malicious injuries to these rights as *crimes*.

Rem. The righ to defend or recapture property is sometimes identified with the right of self-defence against injuries to security and liberty, but in reality it rests upon a different principle and is confined within much narrower limits. Where the property attacked is a dwelling house, and thus partakes of the sanctity of the person of the occupant, and the attack if completed would be a felony like burglary or arson, the possessor may resist it even by taking life. Other invasions of property may be prevented by milder means, but ordinarily not when the defence would involve a breach of the public peace or an assault upon the offender or a trespass against third persons. The remedies provided by the law are generally deemed by it to be sufficiently prompt and ample to protect and vindicate these rights without the resort of the injured party to such extreme measures as may be necessary in defence of personal rights.

READ: 3 Bl. Com., pp. 3, 4.

§ 46. Of the Legal Limitations upon Property Rights.

Property rights, like personal rights, are subject to various legal limitations. The *right to acquire* property may be restricted as to the kind or quantity of the property, or the mode of acquisition, or the persons by whom it is acquired. The *right to enjoy* property is strictly regulated by laws intended to prevent public and private nuisances. The *right to dispose* of property may be limited by rules prohibiting its destruction, its extravagant consumption, or its transfer to certain persons, in certain places, at certain times, or under certain conditions. The property itself may also, when necessary, be taken by the State for public use under the form of *taxes*, or by virtue of the right of *eminent domain*.

Rem. Instances of the restrictions on the right to acquire property are found in modern game and fishing laws; on the right to enjoy property, in laws regulating the speed of vehicles, the noise and smoke of factories, the conduct of offensive trades, etc.; on the right to dispose of property, in the rules concerning the sale of explosives or intoxicating liquors.

READ: 2 Kent Com., Lect. xxxiv, pp. 338–340;
Barbour, Rights of Persons and Property, pp. 89, 285–295;
Dwight, Law of Persons and Property, pp. 423–446;

Andrews, American Law, § 594;
Clark, Elementary Law, § 68;
Smith, Personal Property, § 5.

§ 47. Of Estates.

The right of naked possession, the right of possession, and the right of ownership are each in their very nature exclusive, and can therefore subsist only in one person or in one collective group of persons at the same time. Consequently an article of property can have, at any given moment, but one owner or group of owners, but one possessor or group of possessors; no other persons having concurrently any rights of possession or ownership therein. This doctrine, applied to concrete articles of property like a piece of land or a horse, would not at all meet the needs of modern social conditions. The landlord and tenant of a piece of land, the owner and hirer of a horse, do each own something, and possess something; and the rights of ownership or possession of one are distinct from, and are assertible against, the rights of ownership or possession of the other; and yet these rights exist at the same time. Either then the rights of possession and ownership are not in their nature exclusive, which is impossible; or the thing owned and possessed is not the concrete article of property which, being single and indivisible, is capable of but one exclusive ownership or possession. The law escapes from this dilemma by declaring that the object of ownership is not the concrete article of property, but a certain interest therein to which it gives the name of an "*Estate.*" This estate is a legal entity, composed of rights and obligations, and as any number of such estates can coexist in the same concrete article of property without conflicting with each other, their concurrent ownership and possession presents no practical or legal difficulties. Thus the landlord owns and possesses one estate in the land, — the tenant another; the owner owns and possesses one estate in the horse, — the hirer another; and the rights and obligations of which the estate of the landlord or the owner consists are entirely compatible with those of which the estate of the tenant or hirer is composed.

Rem. The term "*estate*" like the term "*status*" denotes a legal attitude or relation, and as the status of a person himself is

the sum of his legal rights and duties in reference to himself, so the estate of a person in an article of property is the sum of his legal rights and duties in reference to that article of property. An estate may include all rights and obligations which the law recognizes in reference to the article of property, and thus constitute the sole or *principal estate*, as, for example, a fee simple absolute in land; or it may include only certain restricted rights and duties like an estate at will, and thus be a *subordinate estate*. Between these two extremes estates embracing any number or quality of rights and obligations known to the law may be created. The *content* of an estate is either fixed by law as in estates in dower, or by the act of the party conferring the estate as in a lease for years; and this content cannot be varied after the estate comes into existence without thereby destroying the estate or substituting for it a new estate composed of different rights and duties. When concurrent estates exist in the same article of property the right to use and enjoy the article itself will reside in the person whose estate includes the right of immediate possession. Existing estates may be divided into lesser estates, or may be consolidated in one owner, or may be transferred from one owner to another without varying their content, or may be entirely destroyed; and still no change may take place in the article of property or in its actual possession. The flexibility which this doctrine of estates gives to our law is one of the chief qualities which adapts it to the needs of a progressive people.

READ: 2 Bl. Com., p. 103;
Markby, Elements of Law, §§ 314–334;
Digby, History of the Law of Real Property, p. 233;
Washburn, Real Property, § 123;
1 Greenleaf, Evidence, §§ 189, 523;
Barbour, Rights of Persons and Property, pp. 301–310;
Walker, American Law, § 137;
Andrews, American Law, § 598;
Clark, Elementary Law, § 192;
Smith, Personal Property, § 23;
Kerr, Real Property, §§ 226–228;
Pingrey, Real Property, § 1;
Kirchwey, Readings on the Law of Real Property, pp. 199–203;
Warvelle, Real Property, pp. 7–15, 457–464;
Boone, Real Property, § 13;
Tiffany, Real Property, § 17.

§ 48. Of Estates Real and Personal.

A *real estate* is one created to endure for an indefinite future time. A *personal estate* is one created to endure for a predetermined future time. At one period in our legal history the terms

"*real*" and "*personal*," when applied to property, were regarded as nearly synonymous with "*immovable*" and "*movable*"; and as there is a certain analogy between permanency of duration and fixedness of location or their opposites, the same terms came to be used to distinguish between a transitory and a permanent estate. And though the terms "real" and "personal," when predicated of concrete articles of property, no longer mean "immovable" and "movable," their meaning in reference to estates is still unchanged. In contemplation of law that which is permanent is of higher dignity and value than that which is temporary, and consequently a real estate is always greater than a personal estate in the same article, without regard to their pecuniary importance or prospective durability; and when the two estates meet together in the same person the lesser will, with certain exceptions, be merged and lost in the greater. Thus an estate granted to an octogenarian for his own life is greater than an estate granted to another person in the same article for a thousand years; and if the octogenarian should purchase the lesser estate it would merge at once in his life estate, and cease with it at his death.

Rem. The distinction between real and personal estates is principally applicable to estates in real property, as will hereafter be seen; but estates in personal property are sometimes of such a character that the same classification, and the rules which follow it, become imperative. An estate for years in personal property, to be followed by a perpetual estate in the same property in another person, for example, presents questions of law which require this distinction to be made and its consequences enforced.

READ: 2 Bl. Com., p. 386;
2 Kent Com., Lect. xxxv, p. 342;
Rice, Real Property, § 3;
Warvelle, Real Property, pp. 66–68, 128, 129.

§ 49. Of Estates Legal and Equitable.

The courts of common law and courts of equity differ as to the method and the measure of the redress which they provide for violated rights and obligations. Some estates are so created that their rights and obligations can suffer no invasion for which the courts of common law cannot apply a remedy. Other estates

are of such a character that no adequate protection can be afforded them except in courts of equity. To the former is given the name of *legal estates;* to the latter, that of *equitable estates.* An equitable estate is always derived from and dependent upon some legal estate, and must therefore always have some legal estate to support it. Hence if there be but one estate in an article of property it is a legal estate. If there be both a legal and an equitable estate the legal estate is the superior estate in the courts of common law. If a legal and equitable estate meet in the same person, the equitable estate, except in certain cases, merges in the legal.

Rem. The courts of common law were permanently established, and their powers and procedure were determined, in an age when almost the only property known to the law was land, and when the only property right clearly perceived and protected by the law was the right of possession. The remedies applied by these courts were, therefore, adapted to the vindication of possessory rights, and possession or the right to the present or expectant possession of the property became the characteristic of legal estates. But when, as a result of social development, other estates were created which did not contemplate the possession of the property, but the enjoyment of its benefits while the property itself remained in the possession of another, the remedies provided by these courts were not sufficient to enforce the rights contained in such estates, and jurisdiction over them was therefore taken by the courts of equity whose methods of procedure were adapted to protect them. Thus where land is conveyed to A with instructions to apply its net income to the support of B the legal estate of A can be recognized by the courts of common law, because it includes the right of possession, and if his possession is disturbed they will afford him an adequate remedy, but they have no form of procedure by which they can compel A to expend the income for the benefit of B. For this purpose B must seek the aid of a court of equity, which can compel A to perform his duty under penalty of imprisonment for contempt of court. This example also illustrates the dependence of the equitable on the legal estate; for if there were no outstanding possessory estate, the benefits to which B is entitled never would accrue, or if spontaneously produced there would be no one on whom B could call for their management and application. Obviously, also, if B's estate expires the legal estate of A would be the only estate, while if the equitable estate of B should be transferred to A the legal estate would reside in him free from

the obligation to account to B for the income of the property, and thus the equitable estate would be swallowed up and lost in the legal estate. On the other hand, should B acquire the legal estate the right to the benefits would be thenceforth inseparable from his possessory right, and the equitable estate, as distinguished from the legal estate, would disappear.

READ: 2 Bl. Com., pp. 327–331;
4 Kent Com., Lect. lxi, pp. 289–294;
Barbour, Rights of Persons and Property, pp. 50–53;
Walker, American Law, §§ 169–172;
Andrews, American Law, §§ 631–634;
Clark, Elementary Law, § 203;
Tiedeman, Real Property, §§ 437–440;
Kirchwey, Readings on the Law of Real Property, pp. 397–400;
Warvelle, Real Property, pp. 117–119.

§ 50. Of the Species of Property: Real Property: Personal Property.

Property consists of things and therefore, like things, is either Corporeal or Incorporeal, Movable or Immovable, Personal or Real. For the purposes of classification the latter division is most convenient, since the line of demarcation between the real and the personal is fixed by the law, and the law of property itself is divided into the Law of Real Property and the Law of Personal Property. *Real property* comprises those things, whether corporeal or incorporeal, movable or immovable, which are governed for the time being by the Law of Real Property. By operation of law they are clothed with the following legal characteristics: (1) They are controlled by the *lex rei sitæ*, or law of the place where they are situated; (2) They can be transferred by one person to another only by a deed or devise in writing; (3) At the death of their owner intestate they descend to his heir at law; (4) When the owner is unlawfully deprived of their possession he can regain it by an action at law. *Personal property* comprises those things, whether corporeal or incorporeal, movable or immovable, which are governed for the time being by the Law of Personal Property. Their legal characteristics are these: (1) They are controlled ordinarily by the *lex domicilii*, or law of the place where their owner has his domicile; (2) They can be transferred without a deed; (3) At the death of their owner intestate they vest in his executor or other personal representative and not in his heir; (4) When their owner is deprived of their possession his usual

remedy is an action for damages. Local statutes and customs sometimes vary the details of these characteristics, but as a whole they serve to distinguish the articles which the law considers real from those which it considers personal.

Rem. The rules which constitute the Law of Real Property and the Law of Personal Property were, for the most part, conceived and established during the period when the real was considered as identical with the immovable, and the personal with the movable. Hence the four characteristics of each are evidently predicated of them in these aspects, — for it is the immovable which is naturally governed by the *lex rei sitæ*, which requires a deed to transfer it, which descends to the heir, and is recovered *in specie* by the dispossessed owner; while it is the movable which follows the owner wherever he goes and is thus governed by the law of his domicile, which can be transferred by delivery, passes to the executor instead of the heir, and if wrongfully taken away from the owner can rarely be recoverable *in specie* and so entitles him to damages. But when the law, in later times, was forced by social conditions to recognize certain movables as possessing the first four legal characteristics, and certain immovables as endowed with the other four, the identity between real and immovable and between personal and movable disappeared, and each article now is assigned to its class by the legal characteristics which the law for the time being imputes to it, and not by its natural qualities. Thus under certain circumstances the law regards land as personal property, or money as real property. Parties owning movable articles may by agreement make them real, or change the immovable into personal. And precisely the same article, when falling under the jurisdiction of one State, may be considered personal, and by the laws of another State be recognized as real. This apparent conflict does not, however, tend to confusion, since it is only necessary to ascertain which set of characteristics the local law imputes to any article in order to determine by what rules it is to be controlled.

READ: 2 Bl. Com., pp. 16, 384–388;
Rob. Am. Jur., § 117;
Williams, Real Property, pp. 1–10;
Markby, Elements of Law, §§ 129, 130;
Barbour, Rights of Persons and Property, p. 300;
Dwight, Law of Persons and Property, pp. 419, 420;
Kerr, Real Property, §§ 27, 28;
Rice, Real Property, §§ 1, 7;
Warvelle, Real Property, pp. 2–7;
Tiffany, Real Property, § 6;
Ante, § 26.

SECTION II

OF REAL PROPERTY

§ 51. Of the Classes of Real Property.

Real property is of two classes: (1) Corporeal; (2) Incorporeal. *Corporeal real property* is physical and tangible, can be visibly occupied and enjoyed by its owner, and can be transferred by delivery from one person to another. *Incorporeal real property* is immaterial and intangible, and though it can be visibly enjoyed it cannot be physically occupied or delivered.

Rem. Real property is sometimes said to consist of *lands, tenements, and hereditaments.* This statement, though true, is not an accurate classification of real property. *Hereditament* is a general term including everything that can be inherited, — that is, everything which can vest in the heir by operation of law at the death of the present owner. *Tenement* is a more limited term, denoting such hereditaments as, under the feudal law, could be held of some superior lord. *Land* is a word of still narrower meaning, signifying such hereditaments as are corporeal.

READ: 2 Bl. Com., pp. 16, 17;
3 Kent Com., Lect. lii, p. 401;
Barbour, Rights of Persons and Property, pp. 297–299;
Clark, Elementary Law, § 70;
Brantly, Personal Property, § 4;
Tiedeman, Real Property, § 11;
Kerr, Real Property, §§ 21–26;
Rice, Real Property, §§ 2, 4, 5;
Warvelle, Real Property, pp. 27–33;
Boone, Real Property, §§ 1, 2.

ARTICLE I

OF CORPOREAL REAL PROPERTY

§ 52. Of the Species of Corporeal Real Property: Land.

Corporeal real property is of five species: (1) Land; (2) Minerals; (3) Waters; (4) Vegetation; (5) Fixtures. *Land* is a definite portion of the surface of the earth, together with the space below it bounded by lines which meet at the center of the globe, and the space above it bounded by lines which reach indefinitely upwards. Land embraces both the space within these

lines and the materials which occupy the space while they are in their natural situation, but if the materials should be removed the land still remains complete in quantity and unchanged in identity though its value may be impaired. Land may be owned in parcels separated by vertical or by horizontal boundaries. When separated by vertical lines each parcel reaches from the center of the earth to the highest heavens. When separated by horizontal boundaries the stratum of each owner is a distinct article of property.

Rem. Land is a term used in various senses in the law. In distinguishing between the species of corporeal real property its meaning is limited, as above explained. In a deed, where terms are construed most strongly against the grantor, "land" carries all species of corporeal real property contained within the described area. In some ancient forms of pleading it denoted only arable land. In modern statutory law it may cover even personal property, where this appears to have been the intent of the legislature.

READ: 2 Bl. Com., pp. 17–19;
Barbour, Rights of Persons and Property, pp. 296, 297;
Andrews, American Law, §§ 595, 596;
Tiedeman, Real Property, §§ 1, 2;
Pingrey, Real Property, §§ 1, 2, 5, 6;
Jones, Real Property, §§ 1592–1594;
Warvelle, Real Property, pp. 33, 34;
Boone, Real Property, §§ 407, 409, 413;
Tiffany, Real Property, §§ 217, 218.

§ 53. Of Minerals.

Minerals are the inorganic substances which form, or once formed, part of the body of the earth, and are destitute of life and incapable of supporting it. Among these are included all soils and rocks, metals, clay, sand, coal, salt, petroleum, and natural gas. Minerals in their natural beds, or when removed and then reincorporated with the earth in the same or another place, are part of the land; but when permanently severed they are personal property. The *ownership of minerals* follows that of the land unless separated from it by some grant or contract. Where the minerals belong to one person and the remainder of the land to another, each must so use his portion as not to interfere unreasonably with the enjoyment of the other.

Rem. The relation between the owner of the minerals *in situ* and the owner of the land depends on the form of the grant or contract by which the estate in the minerals is created. Thus the grant may confer a mere *revocable license* to take and carry away the minerals; or a *perpetual right* to remove and appropriate them; or the *ownership* of the minerals themselves. In either case the grantee has the right to operate the mines in the usual manner, doing no unnecessary injury to the other land. If the minerals underlie the other land he must leave a sufficient support to maintain it in its natural position. The upper owner, on his part, must impose no undue burden on the overlying land.

READ: Kerr, Real Property, §§ 90–98, 2229;
Pingrey, Real Property, §§ 3, 4;
Jones, Real Property, §§ 1592–1594;
Rice, Real Property, § 9;
Warvelle, Real Property, pp. 34–36;
Boone, Real Property, §§ 6–6 *a*, 146;
Tiffany, Real Property, §§ 219–222.

§ 54. Of Waters.

Waters are *divided physically* into: (1) Tidal Waters; (2) Watercourses; (3) Standing Waters; (4) Surface Waters. *Tidal waters* are waters within the ebb and flow of the tide, including the ocean and its tributaries as far up as the tide ebbs and flows. *Watercourses* are streams of water having a definite origin and outlet, normally confined within definite banks, flowing in a perceptible current, and having fixed and regular sources of supply. They may flow either upon or beneath the surface of the earth. *Standing waters* are bodies of water of whatever size, either wholly stationary or moving without a perceptible current from one place to another. Standing waters contained in the body of the earth, and either motionless or oozing by drops from one place to another, are also called "percolating waters." *Surface waters* are waters precipitated from the atmosphere as rain or snow, and either lying on the surface of the earth, or descending from higher land to lower until they are evaporated, absorbed, or discharged into some natural stream and become incorporated in its waters. In reference to their judicial control waters are *legally divided* into two classes: (1) Navigable; (2) Non-navigable. *Navigable waters* are waters which are within the jurisdiction of the admiralty courts, and are useful to the public for the purposes of navigation. Formerly tidal waters

only were considered navigable, but with the advance of commerce it has become a settled doctrine that waters navigable in fact are also navigable waters in law. *Non-navigable waters* are waters which are too narrow, too shallow, or too much obstructed to be navigable in fact, and are consequently not within the admiralty jurisdiction. Waters are *navigable in fact*, if, in their natural condition, they permit the passage of boats, rafts, or logs one or both ways, either continuously or at regularly recurring seasons of the year. In reference to property rights waters are also *legally divided* into (1) Public waters; and (2) Private waters. *Public waters* with their beds belong to the State, and are open to the public, subject to State regulation, for the purposes of navigation and fishery. *Private waters* with their beds belong to private persons, and if navigable in fact are open to the public for navigation, but not for fishery. Tidal waters, with the exception of marshes and shallow inlets incapable of public use, are always public waters. According to the local laws of several of our American States, all watercourses and standing waters, which are navigable in fact, are public waters; in other States all non-tidal waters are of private ownership. Non-navigable waters unless they are tide waters, as well as subterranean waters and surface waters, are always private. The *boundary line* between public tidal waters and the private upland is, in most of our States, the ordinary high water mark, and the space between high and low water mark, when bare, is called the "shore," and may be used by the public for passing, fishing, or gathering sea-weed or wreckage. In a few States this boundary is ordinary low water mark and the shore belongs to the owner of the adjoining upland. On public non-tidal waters the boundary between public and private ownership is ordinary low water mark. In the absence of some grant to the contrary land bounded on private waters reaches to low water mark, though where a private watercourse divides the land of two opposite proprietors the boundary is presumed to be the *filum aquæ*, or thread of the middle of the stream.

Rem. In reference to the *use and enjoyment of waters* the following rules have been established: (1) All public waters are open to universal use for fishery and navigation, subject to such general regulations as the State may impose; (2) Riparian owners upon

public waters have a right of access to the waters, and a right to build wharves protruding from their land into the waters in aid of navigation; (3) A private watercourse, running through or between the lands of different proprietors, belongs exclusively to neither, and neither can unreasonably detain, divert, or pollute the water to the injury of the others, but a superior right to use the water for domestic and agricultural purposes resides in the upper proprietor as against the lower, and his needs may be satisfied at the expense of theirs, while in some States a similar right to use the waters for manufacturing, mining, or irrigating purposes is vested in the occupant who first devotes them to such use; (4) Private standing waters may be used as their owner pleases unless they form part of the supply of a watercourse, in which case they are governed by the foregoing rule; (5) Surface waters belong to the owner of the land on which they fall or flow by nature, and he may use them as he will, but his right to protect his land against their natural influx from other land is differently held in different States, — some declaring that he must receive the burden as nature imposes it, others ruling that surface water is a common enemy, against which every person may defend his own land by any method which does not increase the quantity or momentum of that which would naturally fall or flow upon adjoining land; (6) The use of private as well as public waters is subject to regulation by the State, in order that each owner may obtain a reasonable benefit. *Ice* is governed as to its ownership and use by the same general rules as the water from which it is formed. On public waters it is common to all, both for highway and domestic use; when severed from the water it becomes personal property.

READ: 3 Kent, Com. Lect. lii, pp. 427–432;
Brantly, Personal Property, § 98;
Kerr, Real Property, §§ 70–77, 108–111;
Pingrey, Real Property, §§ 8–10, 14, 15, 207–236;
Jones, Easements, §§ 725–786;
Rice, Real Property, § 6;
Kirchwey, Readings on the Law of Real Property, pp. 407–409;
Warvelle, Real Property, pp. 42–47;
Boone, Real Property, §§ 4–4 *g*, 417–419, 421;
Tiffany, Real Property, §§ 264–270, 297–300, 302, 303.

§ 55. Of Vegetation: Plants: Crops.

The vegetable productions of the earth constitute its *vesture*. Scientifically, they are divided into trees, shrubs, and herbs. *Trees and shrubs* have a permanent stem as well as a permanent root, their fruit and sometimes their foliage being transitory

Herbs may or may not have a perennial root, but their stems, leaves, and fruit are periodically renewed. Legally the vesture of the earth is divided into plants and crops. *Plants* include the permanent portions of trees, shrubs, and herbs. *Crops* embrace the fruit of trees and shrubs, the stems, leaves, flowers, and fruit of herbs which have a perennial root, and the roots of herbs when perishable. This legal distinction is made because plants, being permanent, are usually regarded as parcel of the land and consequently real property, while crops, being destined by nature for removal from the land and consumption by men or animals, partake, even when growing, of the character of personal property. Plants are of two classes: (1) Timber trees; (2) Trees and shrubs which are not timber. *Timber trees* are those which are fit for building and repairing houses or vessels. In England the law recognized the oak, the ash, the elm, and in some localities the beech and other durable trees as timber. In this country the local custom, based on fitness for building as demonstrated by experience, furnishes the test of timber. Timber trees have a peculiar sanctity in the law, and are protected by special rules, but trees and shrubs which are not timber are governed by the ordinary law of plants. Crops are also of two classes: (1) Fructus naturales; (2) Fructus industriales. *Fructus naturales* are those crops which are produced by nature, substantially without the aid of man. These while still growing, unless severed by contract from the land, as when planted by a lawful temporary occupant, are a portion of the realty, descend or are transferred with the inheritance, and are not subject to attachment or execution apart from the land. When mature and ready for harvest they are personal, except for such purposes as require them to be considered real in order to protect the rights of persons who may be interested in them. *Fructus industriales* are those crops whose existence or usefulness depend largely on human labor. These, when planted by the owner of the land and still unsevered, are regarded as real property, and pass with the land, though subject to a separate attachment and execution, or to sale or mortgage apart from the land; and if the owner dies intestate will vest in the personal representative, not in the heir. When planted by persons other than the owner of the land they are personal property, both before and after their maturity.

Rem. The *ownership of plants*, while standing and growing, follows that of the land, unless the owner of the land has separated them from the land by some grant or agreement. Thus *trees whose trunks are wholly on the soil of one proprietor* belong entirely to him, although their branches and fruit may overhang and their roots may under-run the land of adjoining owners, and are removable by them. *Trees growing in a boundary line* belong to both proprietors, and except in extraordinary emergencies neither can injure them to the damage of the other. *Trees in a highway* are the property of the owner of the land, but are subject to pruning or removal when required by travel. *Trees sold to be cut at once* are regarded by the local law of some States as the personal property of the buyer; under the laws of other States they remain the property of the owner of the land till actually removed. *Trees sold to be cut at some indefinite future time* are still real property; but whether they belong to the buyer or the seller depends on the sufficiency of their contract to pass the title to the realty. *Trees wrongfully cut and removed* from the land belong to the wrongdoer as against all persons but the true owner. *Fructus naturales*, whether still standing or already cut and removed, are the property of that owner of the land in whom, while they were growing, the right to immediate possession of the land resided. *Fructus industriales*, while growing, are the property of the current lawful possessor of the land though planted by a trespasser, but if harvested and removed by the intruder they belong to him. *Annual crops* planted by a tenant for an indefinite term are his although his term may unexpectedly expire before the harvest; and in some of our States the same ownership is recognized in tenants whose estates are of certain and definite duration. *Tenants hiring land on shares* have an interest in the crop in common with the owner of the land from the time of planting until it is finally divided; but employees receiving a share of the crop as their wages, or occupants paying a share of the crop as rent, are not tenants in common with the owner of the land at any time; the employee in the first case, and the landlord in the second, having no property in the crop until it is harvested and divided.

READ: 2 Bl. Com., p. 281;
Brantly, Personal Property, §§ 34–39;
Tiedeman, Real Property, §§ 8–10, 201;
Kerr, Real Property, §§ 50–59, 1365–1374;
Pingrey, Real Property, §§ 7, 18, 42, 43, 601–615;
Jones, Real Property, §§ 1600–1634;
Rice, Real Property, § 8;
Warvelle, Real Property, pp. 36, 37, 91, 92;
Boone, Real Property, §§ 5–5 *a*, 414–416;
Tiffany, Real Property, §§ 223–230.

§ 56. Of Fixtures.

A *fixture* is an article of corporeal personal property which has been attached to land under such circumstances that the law regards it as having become temporarily or permanently real. An article of corporeal personal property attached to land is now usually presumed by law to continue personal, and to be removable by its owner, and to be capable of being sold or mortgaged or taken in execution apart from the land. But in the three following cases this presumption is reversed and the article is considered real: (1) Where the attachment is made by virtue of an agreement, between the owner of the article and the owner of the land, that the article when attached shall become real; (2) Where the attachment is wrongfully made by the owner of the article without the consent of the owner of the land, and the article thereby becomes forfeited to the land; (3) Where the attachment brings the attached article, either directly or indirectly, into persisting physical relations with the land for the purpose of improving the land or of promoting its more convenient use. In this third case the attachment is called *annexation,* and has two requisites: (*a*) The mode of attachment must be definite and permanent, as distinguished from a mere deposit of the article in the land, or its use on the land, or its transit across the land; (*b*) The purpose and effect of the attachment must be to render the article subservient to the land, as distinguished from an attachment made for the sake of the article, as to conceal it or preserve it or steady it while in use. Such annexation may consist in connecting the article with the soil by artificial fastenings, or by imbedding it in the land, or by resting its weight upon the surface; and may either be *direct* as where the article in question is itself brought into actual contact with the land, or be *indirect* as where the article, though not itself upon the land, is tributary to some superior article which is in contact with the land, like the keys of a building or the loose portions of fixed machinery. The presumption arising from annexation may be rebutted by proof of an agreement, between the owner of the land and the owner of the article, that notwithstanding the annexation the article should continue personal, or by showing that according to a local custom annexation does not change the article from personal to real, or by evidence that the owner of the land is

estopped to claim that the article has become a part of his estate.

Rem. Whether an article of corporeal personal property which has been attached to land can be removed by the attacher, against the will of the owner of the land, is a question which cannot be answered simply by determining whether the article continues personal after the attachment, or has thereby been made a part of the realty itself. If the article continues personal it is removable by the attacher as a matter of course unless he has, by contract or otherwise, released or forfeited his right to its possession. But though it has become real it may, under modern rules, be in many cases also removable at the will of the attacher. According to the maxim of the ancient law, *Quicquid plantatur solo, cedit solo*, the union of an article of corporeal personal property with the soil made it a permanent portion of the realty unless the owner of the realty himself chose to sever it. This maxim worked no special hardship in an agricultural age and community, where buildings, fences, and trees constituted the principal additions to the soil; but was entirely unsuited to the commercial life of towns, where temporary tenants were obliged to attach valuable articles to rented land for their mercantile, manufacturing, or commercial use. Annexation to the soil, though still indicating that the article had changed its character from personal to real, then no longer served as a test of its removability, but gave place to the new doctrine that the intention of the owner of the article annexed and of the owner of the land to treat the article as removable or irremovable, as manifested by their acts and relations at the time of the annexation, and by their subsequent conduct in reference to the annexed article, must be regarded as determining the existence or non-existence of the right of the annexer to remove it. Under this doctrine the following circumstances are held by the courts as conclusively establishing the right of removal: (1) Where the right of removal was conferred upon the annexer by a valid agreement now binding the parties interested in the land; (2) Where the right of removal is based upon a local or business custom, known to and obligatory upon all persons who might be prejudiced by the removal; (3) Where the objector is estopped by his own fraud or wrong from denying the right of the annexer to remove the article; (4) Where the annexer of the article is a vendee in possession of the land to whom the owner now refuses to convey; (5) Where the annexer is a tenant for years who has attached the article to the land for his own use in his trade, or in his domestic and in some cases in his agricultural operations, and has attempted to remove the article before or at the termination of his tenancy, and can do so

without the destruction of the article or inflicting serious injury upon the land. On the other hand, the following circumstances show conclusively that there is no right of removal: (1) Where the article was wrongfully annexed to the land by the owner of the article without the consent of the owner of the land: (2) Where the article was annexed to the land by a tenant who has abandoned the land or taken a new lease thereof without removing or reserving it; (3) Where the article was annexed by a vendee in possession of the land who now refuses to complete his purchase; (4) Where the article was annexed by the owner of the land who has since sold or mortgaged the land without excepting the article from the operation of his deed; (5) Where the article was annexed by the owner of the land who has since died without appropriating the article to his personal estate; (6) Where the article was rightfully annexed by its owner for the purpose of transferring his property therein to the owner of the land; (7) Where the annexed article cannot be removed without destroying its own value and that of the materials of which it is composed; (8) Where the annexed article cannot be removed without causing irreparable injury to the land; (9) Where custom or agreement or acts amounting to an estoppel forbid the claimant to remove the article. In cases where none of these conclusive circumstances occur, other facts and conditions analogous to the foregoing, but less strong and convincing, are resorted to by the courts to ascertain the intention of the annexer and the owner of the land in making and continuing the annexation, and the consequent existence or non-existence of a present right of removal. Annexed articles, where lawfully removed, resume their character of personal property. The annexed articles, concerning which the questions just discussed have most frequently arisen in the courts, are buildings with their necessary parts, fences, the permanent appliances of railroad and other corporations, plants, manure dropped on the land, machinery, and fixed articles of trade or household furniture.

READ: Barbour, Rights of Persons and Property, pp. 587–590;
Walker, American Law, § 135;
Andrews, American Law, § 597;
Clark, Elementary Law, § 71;
Brantly, Personal Property, §§ 8–33;
Tiedeman, Real Property, §§ 3–7;
Smith, Personal Property, §§ 9–12, 18;
Kerr, Real Property, §§ 65–69, 83–88, 104–107, 112–147;
Pingrey, Real Property, §§ 44–83;
Jones, Real Property, §§ 1665–1769;
Rice, Real Property, §§ 10, 12, 14–19, 200;
Warvelle, Real Property, pp. 37–42;
Boone, Real Property, §§ 7, 8 *a*–9 *f*, 12, 424;
Tiffany, Real Property, §§ 231–245, 262, 263, 312.

Article II

OF INCORPOREAL REAL PROPERTY

§ 57. Of Incorporeal Hereditaments.

Incorporeal property consists mainly of rights which either issue out of, or relate to, or result in the enjoyment of corporeal property; or which entitle their owner to some service, profit, or benefit from the persons against whom the right subsists; or which confer upon their owner some new status or capacity which is presumed to be to his advantage. An instance of a *right issuing out of* corporeal property is the right which one tract of land has to be supported in its natural position by another; of a *right related* to corporeal property is the right of one person to bathe in waters belonging to another; of a *right resulting in the enjoyment* of corporeal property is the right of one person to pasture cattle in the land of another; of a *right entitling* its owner to some service, profit, or benefit from another person is the right which one may have to the performance of a contract or the discharge of an official duty by the other; of a *right conferring a new status* is the right granted to a group of individuals to be a corporation. These rights are very numerous, and occupy a most important position in society and therefore in the law. They may be real or personal, but when so created as to be governed by the law of Real Property they are inheritable and are called Incorporeal Hereditaments. The principal species of incorporeal hereditaments now known to our law are these: (1) Commons; (2) Advowsons; (3) Tithes; (4) Corodies; (5) Pensions; (6) Offices; (7) Dignities; (8) Annuities; (9) Rents; (10) Franchises; (11) Lateral and Horizontal Support of Land; (12) Party Walls; (13) Pews; (14) Burial Rights; (15) Light and Air; (16) Aquatic Rights; (17) Ways.

Rem. Although the incorporeal hereditaments which the law recognizes can be enumerated, they seem incapable of any logical classification according to their attributes. They are however subject to certain divisions which affect their legal qualities. Thus one division is between hereditaments which authorize their owner to take a portion of the substance of the land of another for his own use, as to pasture cattle, cut wood, or catch fish thereon, and which are called *profits à prendre;* and heredit-

aments whose exercise leaves the substance of the land in which they are enjoyed intact. Another division distinguishes between hereditaments which issue out of land and give to the owner of the land, because he is its owner, a privilege in other land, and hereditaments which belong to a person irrespective of his ownership of other land; the former being known as *rights appurtenant;* the latter as *rights in gross.* A third division is into *affirmative hereditaments* and *negative hereditaments;* the affirmative authorizing its owner to do some act in another's land; the negative forbidding the owner of the land to use it in some particular manner. A fourth division is between *continuous* and *non-continuous* hereditaments; a continuous hereditament being one which having been once exercised by its owner continues in practical operation indefinitely without human aid, like a party wall; a non-continuous hereditament, on the contrary, being one whose enjoyment consists in transient acts at uncertain intervals, like a right of way. Every incorporeal hereditament stands on one side or the other of these dividing lines, and is either a *profit à prendre* or not a *profit à prendre,* either appurtenant or in gross, either affirmative or negative, either continuous or non-continuous. An incorporeal hereditament which is not a *profit à prendre* and is appurtenant, and is exercisable within or over the land of another, is called an *easement.* To every true easement two landed estates are necessary: (1) The *dominant estate* to which the hereditament is appurtenant; (2) The *servient estate* in or over which the hereditament is to be enjoyed. Easements may be continuous or non-continuous, affirmative or negative. A *servitude* is an incorporeal hereditament imposing a burden upon the land of another, but as it may be held in gross or as appurtenant, it is not in every case an easement.

READ: 2 Bl. Com., pp. 20, 21;
3 Kent Com., Lect. lii, pp. 401, 402;
Washburn, Easements, ch. i, sec. i;
Holland, Jurisprudence, pp. 163, 164–169;
Markby, Elements of Law, §§ 400–430;
Walker, American Law, § 132;
Andrews, American Law, §§ 606–614;
Clark, Elementary Law, §§ 189, 191;
Tiedeman, Real Property, §§ 587, 588;
Kerr, Real Property, §§ 78, 2174, 2175, 2208–2213;
Pingrey, Real Property, §§ 84, 85, 129–141;
Jones, Easements, §§ 1–62;
Rice, Real Property, §§ 181–185;
Kirchwey, Readings on the Law of Real Property, pp. 15–27, 36, 37;
Warvelle, Real Property, pp. 49–51, 52–55, 61, 62;
Boone, Real Property, §§ 135–135 *a*;
Tiffany, Real Property, §§ 4, 5, 304, 305.

§ 58. Of the Creation and Extinguishment of Incorporeal Hereditaments.

An incorporeal hereditament, being less than the supreme dominion over the property or person against whom it is exercised, *must always arise* from the actual or presumed concession of the person in whom such supreme dominion resides; and being also intangible and incapable of physical delivery must be created by some form of conveyance of which delivery does not constitute a necessary part. To a conveyance of this kind the law gives the name of a *grant;* and hence incorporeal property is said to *lie in grant* as corporeal is said to *lie in livery*. Grants of incorporeal hereditaments are of three classes: (1) Express Grants; (2) Implied Grants; (3) Presumed Grants. An *express grant* is one made by sufficient words as required by the local law. An *implied grant* is not made in express words, but is inferred by law from the express grant of other property to the enjoyment of which the incorporeal hereditament is reasonably necessary. A *presumed grant* is one which, though never made in words nor inferable from the express grant of other property, has been so long in the adverse enjoyment of the claimant of the hereditament, with the knowledge of the person from whom it must have been derived, that the law does not now suffer it to be disputed. An incorporeal hereditament can be extinguished: (1) By the expiration of the time or purpose for which it was expressly limited in the grant; (2) By the cessation of the necessity on account of which it was implied by law; (3) By its permanent abandonment by its owner; (4) By becoming the property of the person from whom it was derived and merging in his superior estate.

Rem. An incorporeal hereditament created by express grant is *defined and described* by the terms of the grant itself. One created by implied grant is *measured by the necessity* from which it is inferred. A person, for example, who conveys to another the rear portion of a lot, retaining the part which bounds on the highway for himself, is supposed thereby to grant a right of access to the highway across his own land as incidental to the conveyance of the rear, since otherwise the grantee of the rear could not enjoy that portion of the land. But if the grantee of the rear portion has other means of reaching the highway, or afterwards acquires them, the necessity ceasing, the right also expires. An

incorporeal hereditament created by presumed grant is *defined* by the character and extent of the long-continued enjoyment from which the grant is presumed. If this enjoyment has not been uniform in extent and character no grant is presumed, and no hereditament exists. The title acquired by presumed grant is called a *title by prescription.*

READ: Tiedeman, Real Property, §§ 597–606;
Kerr, Real Property, §§ 2176, 2177, 2231–2236;
Pingrey, Real Property, §§ 142–206;
Jones, Easements, §§ 80–203, 834–871;
Rice, Real Property, §§ 186–195, 202, 204;
Warvelle, Real Property, pp. 55–57, 60;
Boone, Real Property, §§ 136–140, 147, 148;
Tiffany, Real Property, §§ 16, 315–333, 342–353.

§ 59. Of Commons.

A *common* is the right of one person to take a profit from the land of another. It is a true *profit à prendre,* and its enjoyment always diminishes the quantity of the substance or the product of the servient land. Commons are of various kinds: (1) *Common of pasture,* or the right to pasture cattle on the land of another; (2) *Common of piscary,* or the right to catch fish in the waters of another; (3) *Common of turbary,* or the right to take turf or peat from the land of another; (4) *Common of estovers,* or the right to take wood from the land of another for fuel or repairs; (5) *Common of minerals,* or the right to take coal, stone, sand, clay, and other materials from the land of another. A common may be either *appurtenant* or *in gross,* but being a *profit à prendre* it is never an easement; is always *affirmative* as distinguished from negative; and is usually *non-continuous.*

Rem. In England commons were an important feature of the feudal manor and vested in the manorial tenants as incidental to their tenancy of the arable land, permitting them to draw from the common waste land of the manor their supplies of pasturage, wood, fish, building materials, etc. In this country they are far less frequent and of minor consequence, but many instances of them occur and are governed by the ancient rules.

READ: 2 Bl. Com., pp. 32–35;
3 Bl. Com., pp. 237–241;
3 Kent Com., Lect. lii, pp. 403–419;
1 Coke, p. 122 *a*;
Digby, History of the Law of Real Property, pp. 134–145;

Clark, Elementary Law, § 190;
Tiedeman, Real Property, §§ 591–593;
Kerr, Real Property, §§ 2178–2196;
Pingrey, Real Property, §§ 86–102;
Kirchwey, Readings on the Law of Real Property, pp. 28–30;
Warvelle, Real Property, p. 61;
Tiffany, Real Property, §§ 334–339.

§ 60. Of Advowsons: Tithes: Corodies: Pensions.

Advowsons, tithes, corodies, and pensions were rights arising under the ecclesiastical system recognized by the English common law. A *benefice* is the right of a clergyman to perform religious functions in a parish, and to enjoy the tithes and other emoluments derived therefrom. A *tithe* is the right of the incumbent of a benefice to the tenth part of the yearly income of his parishioners, whether derived from lands, or from the stock upon lands, or from their personal industry. An *advowson* is the right of one person to present another to a benefice. To *present to a benefice* is to appoint the clergyman who is to perform the religious functions and receive the emoluments. The advowson usually belongs to the owner of the land in which the parish is situated, but may be transferred to others; and as a means of providing for dependent relatives is often of great pecuniary value. A *corody* is the right of one person to receive sustenance from another on account of the ownership, by that other, of some corporeal hereditament. A *pension* is the right of one person to receive a stipend in money from another on account of some ecclesiastical or political relationship between them.

Rem. These incorporeal hereditaments in their precise definition are unknown in this country, where the rights of pastors and parishioners are governed by the ordinary law of contracts, as interpreted by the canon law of the ecclesiastical body to which they belong. The rules governing these hereditaments, however, furnish analogies to our law in the regulation of ecclesiastical affairs, and in administering gifts of lands in deeds and wills to third persons to secure the support of the dependants of the testator or grantor.

READ: 1 Bl. Com., pp. 384–395;
2 Bl. Com., pp. 21–32, 49, 276–280;
3 Bl. Com., pp. 88–92;
1 Coke, 17 *b*–18 *a*, 119 *b*–120 *a*, 344 *a*–345 *b*;
Clark, Elementary Law, § 190;
Kirchwey, Readings on the Law of Real Property, pp. 27, 28, 33.

§ 61. Of Offices: Dignities.

An *office* is the right to perform certain official acts and to receive the fees and emoluments arising therefrom. Under the laws of England an office, even in cases where the duties were of a public nature, could be granted to a person and his heirs, and thus vest in them as an incorporeal hereditament. In this country an office is rather a status than an article of property or a contract, though it may endure for life; and is conferred by popular election or governmental appointment, not by private grant. A *dignity* is the right to a title of honor or nobility. In former times dignities were annexed to estates in lands granted by the crown, and descended with the estates to the heirs of the grantee, but the British sovereign now confers them without a grant of lands, and can make them personal or inheritable as he pleases. Our own government is forbidden by the Federal Constitution to bestow them upon any person; and no public functionary of the United States is permitted to receive them from a foreign sovereign without the express consent of Congress. A private American citizen is at liberty to obtain them by purchase or otherwise, and is protected in their enjoyment by the general laws against libel and false personation, as he would be against the misuse of his private name.

Rem. An appointment to office assumes that a vacancy exists and that the appointee is eligible or will become so before his appointment would legally take effect. A person legally appointed to office is obliged to accept it and commence to perform his duties, but may subsequently resign or be removed. A person whose appointment is defective in form but if formally correct would be lawful, and who enters upon the duties of his office, is an *officer de facto*, and his official acts are valid as to all persons except the government itself. No right vests in an official salary until it is actually earned, nor can it be attached or garnisheed by creditors of the incumbent. Neglect of official duty and abuse of official authority furnish causes for civil action or of criminal prosecution against officers of lower rank, and for proceedings in impeachment against those of superior dignity.

READ: 1 Bl. Com., pp. 396–407;
2 Bl. Com., pp. 36, 37;
Rob. Am. Jur., §§ 46–53;
3 Kent Com., Lect. lii, pp. 454, 458;
1 Coke, 16 *b*, 69 *b*;

Cooley, Const. Law, pp. 113, 217;
Clark, Elementary Law, § 190;
Pingrey, Real Property, §§ 103, 104;
Kirchwey, Readings on the Law of Real Property, pp. 31, 32.

§ 62. Of Annuities: Rents.

An *annuity* is the right of one person to receive a yearly stipend in money from another on account of some personal obligation which that other person has assumed, or which has been imposed upon him by the act of a third party or of the law. It resembles a pension except in the ecclesiastical or political character of the party against whom the right subsists. If granted to a man and his heirs it is an incorporeal hereditament. A *rent* is the right of one person to receive a yearly profit, in money, produce, or services, out of lands belonging to another. It may be payable annually, or at aliquot parts of a year, or in fixed periods composed of several years. It must not consist of the substance of the land like a common, but having been paid or taken must leave the land entire.

Rem. The rent above described is not the same thing as the rent paid in this country to a landlord by his tenant for the use of land or buildings. The latter is the result of a contract, like any other debt, and may be real or personal. Under the old English land system when lands were sold or granted, the grantee instead of paying a gross price agreed to render to the grantor a continuous annual service or thing of value, in default of which his estate in the land was forfeited, and this annual service or payment was called rent. A vestige of this may be found in the *ground rents* still existing in some of our older cities. These rents n England were of various kinds: (1) *Rent service*, where the yearly profit consisted wholly or in part of personal services: (2) *Rent charge*, where the yearly profit was charged upon the land in favor of some person other than the grantor; (3) *Rent seck*, or *dry rent*, where the owner of the rent had no right to enforce it by levying a distress upon the tenant; (4) *Rack rent*, where the amount of rent nearly or quite absorbed the entire profit from the land. The rules by which these rents were governed enter into the modern law of landlord and tenant in reference to many of its details.

READ: 2 Bl. Com., pp. 40–43;
3 Kent Com., Lect. lii, pp. 460–463;
1 Coke, pp. 47 *a*, 87 *b*, 141 *b*, 142 *b*, 143 *b*, 144 *b*, 150 *a*, *b*, 151 *a*;

Clark, Elementary Law, § 190;
Brantly, Personal Property, §§ 87–92;
Tiedeman, Real Property, §§ 641–646;
Smith, Personal Property, §§ 154–159;
Kerr, Real Property, §§ 60–62, 2237–2253;
Pingrey, Real Property, §§ 110–128;
Kirchwey, Readings on the Law of Real Property, pp. 33–36;
Boone, Real Property, §§ 12 *a*, 107;
Tiffany, Real Property, §§ 354–364.

§ 63. Of Franchises.

A *franchise* is a branch of the king's prerogative in the hands of a subject. It is a right which naturally inheres in the sovereign, but which has been granted by him, temporarily or permanently, to a private citizen. Franchises are or have been of great variety. The principal ones now in use are: (1) The right bestowed on private individuals *to be a corporation;* (2) The right, sometimes delegated by the State to *quasi*-public corporations, to take property by *eminent domain;* (3) The right to a *monopoly;* (4) The right to establish *bridges or ferries* over public waters; (5) The right to *use public highways* and other property for special purposes; (6) The right granted to railway and other companies to fix their *tolls,* or rates for service rendered to the public. When a franchise is conferred upon a person and his heirs it is an incorporeal hereditament. In this country such rights are granted by the legislative body of the State, and may be regulated by it in the interest of the people at large.

Rem. Every right and power whose exercise is necessary to the general welfare of a people is presumed by law to reside somewhere, and where it is not vested in a private person the law finds it in the State. The State is thus an exhaustless reservoir of authority out of which may be drawn legal forces adequate to cope with any possible emergency. This undefined and illimitable authority dwells in the person of an absolute monarch as his prerogative, the content of which has been sometimes partially but never completely enumerated by the law; and portions of this content, when entrusted to the administration of an individual citizen, constitute a franchise. In a republic the same prerogative resides in the legislative body, which is the supreme power in the State, and enables it to do, either by itself or by its delegate, whatever the public good may at any time require. Hence the number, character, and purposes of franchises vary with the cur-

rent needs of society at large. Many once frequent and important have long since disappeared. Others, until recently undreamed of, are now in active exercise; some of which, like those granted to *quasi*-public corporations, lie at the basis of the commercial transactions of the entire world.

READ: 1 Bl. Com., pp. 237–280;
2 Bl. Com., pp. 37–40;
3 Kent Com., Lect. lii, pp. 458, 459;
Clark, Elementary Law, § 190;
Tiedeman, Real Property, §§ 633–636;
Pingrey, Real Property, §§ 105–109;
Rice, Real Property, §§ 170–180;
Kirchwey, Readings on the Law of Real Property, pp. 32, 33;
Warvelle, Real Property, p. 64;
Boone, Real Property, §§ 128–134 *b*.

§ 64. Of the Right to the Lateral and Horizontal Support of Land.

The *right of support* is the right which every owner of a piece of land has to have it supported in its natural position by the surrounding or subjacent land. This right is incidental to the ownership of land, and is an application of the rule that man must receive and use the gifts of nature subject to the conditions which nature has imposed upon them. The right does not, however, extend to buildings or other structures erected on the land; and if their added weight should cause the land to fall into an excavation made with due care on the adjoining land, when without these structures the fallen land would have remained in its natural position, the owner of the land and buildings will have sustained no legal injury.

Rem. The right of support is an instance of an hereditament which is not a profit, and is always appurtenant, continuous, and negative. It deprives the servient land of no portion of its substance; exists only in favor of dominant land; continues of itself when once established; manifests itself not by any act of the owner of the right but by preventing the owner of the servient land from digging it away, and thus depriving the dominant land of its natural support without substituting an adequate artificial support in its place. Where this right exists any excavation of the adjoining land is made at the risk of the excavator; and even where the right is lost through the imposition of undue weight upon the dominant land, it is the duty of the excavator to give the owner of the dominant land due notice of the intended excavation, and to conduct the excavation, if reasonably possi-

ble, in such a manner as to prevent the anticipated injury. A right similar to the right of support is sometimes created by express or implied grant in favor of one building against another, or of one story in a building against the other stories.

READ: Washburn, Easements, ch. iv, sec. i, ii, iv, v;
Walker, American Law, § 134;
Clark, Elementary Law, § 191;
Tiedeman, Real Property, §§ 618, 619, 621;
Kerr, Real Property, §§ 99–102, 2225–2227;
Pingrey, Real Property, §§ 237–260;
Jones, Easements, §§ 585–631;
Rice, Real Property, § 198;
Warvelle, Real Property, pp. 59, 60;
Boone, Real Property, §§ 144, 422;
Tiffany, Real Property, §§ 301, 309, 310.

§ 65. Of Party Walls.

A *party wall* is a division wall built on the line between two adjoining tracts of land, — the owner of each tract owning that portion of the wall which stands on his side of the line, and having certain rights for chimney flues, and other customary purposes, in the portion standing on the adjacent land. Neither of the owners of such a wall can disturb it to the prejudice of the others, but subject to this restriction he may build upon it, or put it to new uses. The expense of keeping it in repair is chargeable upon all the owners, but if it perishes by fire or decay neither can be compelled to rebuild his part of it for the accommodation of the others.

Rem. Various other forms of division wall exist besides the true party wall, but none of them are subject to precisely the same rights on behalf of the adjoining owners. They are generally built under some contract between the parties by which their special privileges are particularly defined. In some of our States party walls are regulated by local statutes.

READ: 3 Kent Com., Lect. lii, pp. 437, 438;
Washburn, Easements, ch. iv, sec. iii;
Clark, Elementary Law, § 191;
Tiedeman, Real Property, § 620;
Kerr, Real Property, § 2228;
Jones, Easements, §§ 632–724;
Rice, Real Property, § 199;
Boone, Real Property, §§ 145–145 *a*, **423**;
Tiffany, Real Property, § 311.

§ 66. Of Pews and Burial Rights.

A *pew* is the right to occupy a particular seat in a church during religious services. Formerly it was, and it still may be, an incorporeal hereditament attached to the ownership of private land, and enjoyed by the tenant of the land as appurtenant to his estate. The right extends no farther than the occupancy of the seat, and is held subject to the right of the trustees or owners of the church to remove it for the purpose of repairing the edifice or rebuilding it in another locality. A *burial right* is the right of one person to inter the bodies of deceased persons in the land or buildings of another. Where the place of interment is private property the right of interment may be an incorporeal hereditament, and endure perpetually or at least so long as the locality can be lawfully used for purposes of burial. Where the place of interment is a public cemetery the burial right is a mere license, and can be terminated whenever municipal regulations may require.

Rem. Except in some ancient churches, a pew right in this country is now usually a temporary privilege granted to the pewholder, and he is regarded by the law as a mere tenant of the pew and sometimes only as a licensee; differing but little if at all from one who occupies a reserved seat at a theater or in a public hall. Where pews or burial rights are permanent property the abandonment or destruction of the place in which the right is enjoyed entitles the owner of the right to compensation from the owners of the servient estate.

READ: 2 Bl. Com., p. 429;
3 Kent Com., Lect. lii, p. 402;
Washburn, Easements, ch. iv, sec. vii, 17;
Walker, American Law, § 136;
Smith, Personal Property, §§ 19, 20;
Kerr, Real Property, §§ 29–44;
Pingrey, Real Property, § 17;
Rice, Real Property, § 11;
Warvelle, Real Property, pp. 47, 48, 65;
Boone, Real Property, § 8;
Tiffany, Real Property, § 314;
Perley, Mortuary Law, pp. 20–210.

§ 67. Of the Right to Light and Air.

The right to *light and air* is the right of the owner of one tract of land to the free and unobstructed passage of light and air to his land across the adjoining land. This is an appurtenant, con-

tinuous, and negative hereditament; the enjoyment of which consists in preventing the owner of the servient land from erecting structures which unreasonably diminish the natural supply of light and air received by the dominant land. Every owner of land abutting on a public highway possesses this right. It may also be created by an express grant from the owner of the private servient land.

Rem. Under the English law the right to light and air might be created by implied grant, as where the owner of a tract of land, on which a building was erected with openings receiving air and light from the remaining land, sold the building and retained the land across which the light and air was accustomed to flow; in which case he could not put the land to uses which unreasonably obstructed the passage of the air and light. The right to light and air might also arise from long-continued enjoyment across any adjoining land, under the rule of presumed grant. These doctrines were recognized and followed in early American cases, but have gradually been modified and restricted until now it is the general rule that an *express grant is needed* to create this hereditament against private land.

READ: 2 Bl. Com., p. 402, note;
3 Kent Com., Lect. lii, p. 448;
Washburn, Easements, ch. iv, sec. vi;
Walker, American Law, § 134;
Clark, Elementary Law, § 191;
Tiedeman, Real Property, §§ 612, 613;
Kerr, Real Property, §§ 82, 2218, 2219;
Pingrey, Real Property, §§ 155, 156;
Jones, Easements, §§ 553–584;
Rice, Real Property, § 197;
Warvelle, Real Property, p. 59;
Boone, Real Property, § 142;
Tiffany, Real Property, §§ 295, 296, 306.

§ 68. Of Aquatic Rights.

An *aquatic right* is the right of one person in or to the private waters of another, or in or to the land of another with reference to private waters of his own. Aquatic rights are numerous and important. Among them are: (1) The right to *dam and detain* running water as against lower owners; (2) The right to *dam and flow back* water over the land of upper owners; (3) The right to *divert or pollute* a watercourse; (4) The right to *appropriate* running water *to artificial uses*. (5) The right to *accumu-*

late and *discharge* water with unnatural force or in new channels over lower land; (6) The right of *floatage* in unnavigable waters; (7) The right of *fishing;* (8) The right to *receive percolating* waters; (9) The right to *draw water* from a spring or fountain on another's land; (10) The right to maintain an *aqueduct* across another's land; (11) The right of *artificial drainage* across another's land; (12) The right to *discharge* water from *eaves* or *spouts* upon another's land; (13) The right of *prior appropriation* for mills, mines, irrigation, and other purposes, which is vested by the local law of some of our States in the first occupant. These rights may arise by express or implied or presumed grant.

Rem. Aquatic rights must not be confounded with the rights, principal or incidental, which are included in the ownership of private waters. Frequently there is a resemblance between them not only in the subject-matter of the right, but in their origin and the mode of their enjoyment. To distinguish between them it is first necessary to ascertain what rights, principal and incidental, are embraced in the ownership of the waters in question under the local law. Any rights in excess of these must have been created by a grant, express, implied, or presumed, from the person upon whose land or waters they impose a burden and thus constitute a new incorporeal property in the owner of the right, distinct from the corporeal property which he previously enjoyed.

READ: 3 Kent Com., Lect. lii, pp. 427–432, 436, 439–447;
Washburn, Easements, ch. iii;
Walker, American Law, § 134;
Tiedeman, Real Property, §§ 614–617;
Kerr, Real Property, §§ 2220–2224;
Jones, Easements, §§ 787–810;
Warvelle, Real Property, pp. 57, 58;
Boone, Real Property, § 141;
Tiffany, Real Property, §§ 307, 308, 367–369.

§ 69. Of Ways.

A *way* is the right of one person to pass and repass over the land of another person by some accustomed or designated path. Ways are of two species: (1) *Highways,* which are open to the use of the entire public; (2) *Private ways,* whose use is restricted to a definite number or class of persons. Private ways only are true incorporeal hereditaments. Private ways are of four kinds: (1) *Footways,* for travelers on foot; (2) *Horse-ways,* for trav-

elers on horseback; (3) *Drift-ways,* for droves of cattle; (4) *Carriage-ways,* for vehicles and the animals propelling them. Each larger class includes the rights embraced in the less. Private ways are *affirmative rights,* and unless fenced in or artificially constructed they are *non-continuous;* but they may be either *appurtenant* or *in gross,* and may be *created* by express, implied, or presumed grant. Where a way is created by express grant its *termini and location* are usually designated in the grant; if not, the grantor may prescribe them, and on his failure to do so the grantee may select them, having reasonable regard to the interests of the grantor. When created by presumed grant they are fixed by the limits of the customary use out of which the presumption of a grant arises. Once established in any of these modes they cannot be changed without the consent of both parties. A way created by implied grant is called a *way of necessity.* The most frequent example of this form of grant occurs when the owner of land bordering upon a highway divides it into two portions, one touching the highway, the other separated from the highway, and then sells either of the two portions and retains the other. Here if the separated portion has no reasonable access to the highway except over the other portion, the law implies a right in the owner of the separated portion to cross the other portion in a proper manner, whenever and so long as the necessity exists. No such right exists, however, in favor of separated land over land which was not, at the time of the separation, a portion of the same original estate. The duty to *repair a way* devolves upon the owner of the right, and for that purpose he may enter on the land and perform whatever acts are necessary. A *way appurtenant* attaches to every portion of the dominant land in case it should be divided, but though the burden on the servient land may thus be increased in quantity its character must not be changed.

Rem. Highways differ from private ways in many respects beside that of being open to the public. The *title to the highway* resides in the State or in a public corporation, not in individuals. While it may be created by express, implied, or presumed grant, it can also be acquired by the act of the State itself under the right of *eminent domain,* or be conferred upon the State by the *dedication* of the land by its owner to the public for use as a

highway. The duty of keeping a highway in *repair* rests upon the public body to whose care it is entrusted by the law, and which is usually made liable to private persons for injuries which they sustain from its neglect of duty. Highways are *intended only for travel* by passengers who are in transit from one place to another, but custom warrants other uses, both on and below the surface of the way. Subject to highway uses the land covered by the way belongs to the adjacent owners, whose *boundary* is presumed to be the *filum viæ*, until the contrary appears.

READ: 2 Bl. Com., pp. 35, 36;
3 Kent Com., Lect. liii, pp. 419–427, 432–434;
Washburn, Easements, ch. ii;
Walker, American Law, § 133, 134;
Clark, Elementary Law, § 190;
Tiedeman, Real Property, §§ 607–611;
Kerr, Real Property, §§ 2197–2207, 2214–2217;
Pingrey, Real Property, §§ 153, 154, 166–184, 188, 189, 191–197;
Jones, Easements, §§ 204–552, 811–833;
Rice, Real Property, § 196;
Kirchwey, Readings on the Law of Real Property, §§ 30, 31, 409–411;
Warvelle, Real Property, pp. 60, 61, 166–170;
Boone, Real Property, §§ 143–143 *b*, 420;
Tiffany, Real Property, §§ 313, 365, 366, 421–424;
2 Greenleaf, Evidence, §§ 657–665.

ARTICLE III

OF ESTATES IN REAL PROPERTY

§ 70. Of the Species of Estates in Real Property.

The nature and scope of the rights and obligations which constitute any estate depend in part upon the character of the property to which the estate pertains, and in part upon the terms of the law or the grant by which the estate is created. As its basis for the classification of estates in real property our law adopts one attribute which is common to all such estates, — to wit, their prospective duration; and on this basis divides estates in real property into six species: (1) *Estates in fee simple*, or estates so created as to be able to endure until all the heirs of the grantee are extinct; (2) *Estates in fee tail*, or estates so created as to be able to endure until the lineal heirs of the grantee are extinct; (3) *Estates for life*, or estates so created as to be able to endure until the death of the grantee or some other specified person;

(4) *Estates for years,* or estates so created as to be able to endure for a designated or immediately ascertainable period of time; (5) *Estates from year to year,* or estates so created as to be able to endure for at least one year, and unless then terminated by the act of one of the parties to continue for a second year, and so on for successive years until thus determined; (6) *Estates at will,* or estates so created as to be able to endure until terminated by the act of one of the parties. The first three of these estates, being of indefinite and unascertainable future duration, are regarded by the law as permanent estates, and are known as *real estates in real property.* The remaining three, being of ascertainable future duration, are regarded by the law as transient, and are known as *personal estates in real property.*

Rem. This system of estates is the outgrowth of those land-holding customs which prevailed in the agricultural districts of England during the Saxon and Norman periods of its history. Under the early Saxons these districts were occupied by small village communities, composed of freemen and serfs, and governing their internal affairs by an assembly of the freemen presided over by the village chief or headman. The land inhabited by the community belonged to the village as a whole. To each household a permanent portion was set out for their dwelling place and curtilage, and the arable land was distributed among the households periodically or whenever the necessity for distribution might arise. The lands unfit for tillage were enjoyed by all in common for pasturage and supplies of wood, stone, or other materials for building purposes and fuel. The introduction of the feudal system gradually changed the village communities into feudal manors, in which the title to the land and the political supremacy were vested in a feudal lord, the villagers became his free or serf tenants, the best portion of the land was held as his domain, and the common portion was known as the lord's waste though still enjoyed by his tenants according to the ancient usages. The relation between the tenants and their feudal lord was of a double nature. They occupied their lands upon condition of certain services or rents to be rendered to the lord, and they were also subject to him by a feudal tie which neither he nor they had power to break against the wishes of the other. The free-tenant was the "*lord's man,*" bound to him for life in feudal service, and holding for life the land to which the service was attached. The serf-tenant was also bound for life under the lord's personal dominion, but occupied such land as the lord might from time to time apportion to him. During this feudal period

the primary conception of a free estate in lands was that of an estate for life; of a serf estate was that of an estate at the will of the lord. Later this conception of a life estate developed into that of a succession of life estates vesting one after another in the tenant and his heirs; and later still into that of a continuous estate residing in the tenant and his heirs until the ancestral stock was exhausted. The serf's estate at will also developed into the estate from year to year and the estate for years. The estate for life and its derivatives, — the estate in fee tail and the estate in fee simple, — being estates granted only to freemen, were called *freeholds*, a name they still retain. The estate at will and its derivatives — the estate from year to year and the estate for years — were called *estates less than freehold*. For the reason given in the text freehold estates are real estates; while estates less than freehold are personal estates or, as they are sometimes designated, "*chattels real*."

READ: 2 Bl. Com., pp. 44–58, 90–98;
3 Kent Com., Lect. liii, pp. 487–509;
Green, Making of England, pp. 154–188;
Walker, American Law, §§ 130, 131;
Clark, Elementary Law, § 198;
Tiedeman, Real Property, §§ 19–26;
Kerr, Real Property, §§ 148–190, 229–244;
Pingrey, Real Property, §§ 20–28, 277;
Rice, Real Property, § 33;
Kirchwey, Readings on the Law of Real Property, pp. 38–73;
Warvelle, Real Property, pp. 68–70;
Boone, Real Property, §§ 14, 19;
Tiffany, Real Property, §§ 7–14, 18.

§ 71. Of Seisin.

According to the feudal customs a freehold estate in corporeal real property was created by a ceremony called "*livery of seisin*." The lord and his future tenant went upon the land and there, in the presence of witnesses, the lord delivered to the tenant a clod or twig as symbolic of the land, while the tenant swore fealty to the lord and promised to perform the services attached to his estate. By this ceremony the legal possession of the land became vested in the tenant, and was the external evidence not only of the tenant's ownership of his estate, but of the feudal tie which bound him to his lord. To this possession the law gave the name of "*seisin*." Seisin is not mere occupation of the land, for this is common both to estates of freehold and to estates less than freehold. Nor is occupation necessary to seisin, for after seisin

has once been acquired by livery and the entry of the tenant nothing can destroy it while the estate endures, except the entry of an intruder who claims a superior freehold title and wholly excludes the tenant from the land. *Seisin* is thus the indispensable and inseparable attribute of a freehold estate in corporeal real property; and as such an estate cannot be created without it, so, should the seisin be lost through the expulsion of the tenant by an intruder, the courts of common law no longer recognize the estate of the tenant but impute the ownership of the freehold to the intruder who now has the seisin, although it has been wrongfully acquired.

Rem. Seisin is not predicable of estates less than freehold in corporeal real property nor of any estates in incorporeal real property. The possessory rights of tenants less than freehold rest upon the seisin of the freehold estate from which they are derived, and if that seisin fails those rights are lost. Estates in incorporeal real property are created not by livery but by grant, and their enjoyment is protected by the seisin of the dominant and servient estates. Where several concurrent or successive freehold estates are created in favor of different tenants at the same moment, livery of seisin is made to the tenant having the immediate enjoyment on behalf of all, and each thenceforth has the seisin of his own estate though his actual enjoyment of the property will be deferred until his turn arrives. Where several estates thus coexist the seisin of the immediate estate alone is now *assertible;* that of a deferred estate remains *unassertible* until the time for its enjoyment comes, but meanwhile it is represented and protected by the seisin of the immediate estate. An assertible seisin is called *seisin in fact* when the tenant is now or has been in actual possession of the land and has not been expelled by an intruder. A tenant whose seisin is at once assertible but who has not yet entered on the land, like the heir of a just deceased tenant, is said to have *seisin in law.*

READ: 2 Bl. Com., pp. 310–316;
4 Kent Com., Lect. lxvii, pp. 480–490;
Washburn, Real Property, §§ 107–116;
Walker, American Law, § 137;
Tiedeman, Real Property, § 24;
Rice, Real Property, §§ 36, 37;
Kirchwey, Readings on the Law of Real Property, pp. 74–77;
Boone, Real Property, § 20;
Tiffany, Real Property, § 15.

§ 72. Of the Relation of Seisin to Freeholds in Futuro.

As livery of seisin is an instantaneous act, taking immediate effect, it is manifestly impossible to create by livery a freehold estate which shall come into existence *in futuro;* and it is equally impossible to create a present freehold which shall come into enjoyment *in futuro* unless at the same time an intermediate estate is created to whose owner livery of seisin might be made, both on his own behalf and on behalf of the future freehold tenant. And even when this is done, if the intermediate estate should fail before the seisin of the future freehold tenant becomes assertible his estate would be also lost, because as an assertible seisin must exist in some one, and could not yet vest in him, the law will find it in the grantor from whom the estates were derived, and out of whom it cannot again proceed without a new livery in connection with a new estate.

Rem. The law presumes that every article of property has an owner, and that in all corporeal real property there is a fee simple estate in whose tenant the ultimate seisin of the land resides. If no subordinate freehold estate exists in the land, or none exists whose seisin is now assertible, the seisin of the original fee simple is at once in active operation, and clothes the owner of that fee simple with entire dominion over the land, so far as the courts of common law are concerned. Hence there can be no complete failure of visible private ownership so long as the heirs of the tenant in fee simple endure and are discoverable; and should no heirs be found the property, estate, and seisin would revert to the State as the original source from which all private estates have been derived.

READ: 2 Bl. Com., pp. 144, 165–168, 314–316;
4 Kent Com., Lect. lix, p. 234.

§ 73. Of the Relation of Seisin to Equitable Estates in Lands.

The courts of common law originated and developed concurrently with this system of estates, and consequently recognized these and no others as *legal estates*, and ignored altogether a mere beneficial interest in lands even though it was of indefinite duration. When courts of equity arose they gave these beneficial interests adequate protection, and hence they became known as *equitable estates*. The radical distinction between an estate of freehold and an equitable estate of indefinite duration is that the

former must be created by livery of seisin, and the seisin must continue in its owner; while the latter cannot be created by livery of seisin, and seisin never resides in its owner, for should the seisin and the equitable estate chance to meet in the same person the equitable estate would be at once merged in the legal estate and disappear. At the same time, in order to secure the enjoyment of the equitable estate against infringement, it is necessary that the legal estate with its assertible seisin should reside in some owner, who can invoke in its defence the aid of the courts of common law, and exercise other legal rights in the control and management of the land. This is the reason for the rule that "there can be no use or equitable estate without a seisin or legal estate to serve it."

Rem. Equitable estates in lands were formerly called *uses*, and were introduced into our landed system in order to avoid some of the restrictions upon the enjoyment and transfer of lands which grew out of the doctrine of seisin. A use was not an estate in the land itself, but was a *confidence* reposed in the holder of the legal estate that he would suffer the owner of the use to take the profits. As the creation of a use did not affect the legal estate in the land, but simply imposed an equitable obligation on its holder, no livery of seisin, not even a written grant, was required, but it could be summoned into existence by a spoken word or by a line of conduct. It might be conferred to take effect at once or at any future time, and needed no intermediate use to support it. It could be bestowed by the owner of the legal estate or by his delegate, and once created it could not be defeated until the confidence was completely fulfilled unless by some fortuity the legal estate on which it was founded was destroyed. These characteristics rendered uses so available for many purposes, which could not be accomplished under the doctrine of seisin, that they multiplied with great rapidity until by the reign of Henry VIII, as Blackstone says, "the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man and the use or profits thereof in another; whose directions with regard to the disposition thereof the former was in conscience obliged to follow and might be compelled by a court of equity to observe."

READ: 2 Bl. Com., pp. 137, 327–332;
4 Kent Com., Lect. lxi, pp. 289–293;
Tiedeman, Real Property, §§ 441–470;
Kerr, Real Property, §§ 1611–1658;
Boone, Real Property, §§ 149, 150.

§ 74. Of Seisin after the Statute of Uses.

The inconveniences occasioned by the great increase in equitable estates, especially in reference to the certainty of title and the enforcement of feudal obligations, led to the enactment of an Act of Parliament in the year 27 Henry VIII (A. D. 1535) which is known as the Statute of Uses, and which provided that the *seisin should follow the use;* or, in other words, that the creation of an equitable estate should *ipso facto* vest the seisin in the person to whom the equitable estate was granted. Thenceforth, with the exception of a few species of equitable estates to which the language of the Statute was not applicable, an open, formal livery of seisin was no longer necessary, and any transaction, however trivial or secret, if sufficient to create a use, also transferred the legal estate. This in turn opened the door to great abuses by the facility it afforded for the perpetration of frauds upon the owners of real property, and by rendering it uncertain to whom the legal estate might at any moment belong; difficulties which were met by another Act of the same Parliament requiring the creation of equitable estates by *bargain and sale* to be by a deed or instrument in writing, which should be publicly enrolled. The delivery of this deed marked the creation of the equitable estate, which the Statute immediately executed by imputing the seisin to the equitable grantee; whereby the delivery of the deed became of the same legal effect as the ancient livery of seisin.

Rem. The Statute of Uses was the last of a long series of Acts of Parliament, now called *Acts of Mortmain.* From the establishment of Christianity, as the state-religion of England, ecclesiastical institutions of great power and wealth were multiplied, and these, from the nature of the case, were exempt from many feudal burdens. Lands donated to them thus ceased to be tributary to their former feudal lords, and lands conveyed to them, and by them granted to their former owners to be held by an ecclesiastical tenure, also escaped from feudal obligations. Under the influence of these two motives — charity and self-protection against feudal impositions — such conveyances became very numerous, and as these institutions were mostly corporations having perpetual existence, lands thus conveyed never came back into the general ownership of individuals, but were forever lost to the service of the State and to their feudal lords. To prevent these conveyances the Parliament first endeavored,

by the earlier Acts of Mortmain, to incapacitate corporations from receiving such conveyances, by depriving them of the power to take and hold the seisin, or legal estate in lands. The corporations met these enactments by resorting to the system of uses, taking a grant of the equitable estate only while the legal estate was conveyed to a third party or held by the former owner for their use. At this device the *Statute of Uses* was aimed, and since under former Acts of Mortmain these corporations could not take the seisin and under the Statute of Uses they could not receive an equitable estate without receiving the seisin also, it seemed for the moment as if the drift of landed property into corporate ownership was stayed. About twenty-one years, however, after the passage of this Statute the courts of common law, in construing a conveyance of land to A for the use of B for the use of C, decided that *a use could not be limited upon a use*, and therefore that the use to C was void, while the conveyance to A for the use of B vested, under the Statute, the legal estate in B. But the courts of equity refused to recognize this doctrine and held that C had rights which could not be ignored; and that since at common law the legal estate must vest in B, an equitable estate resided in C which the courts of equity would enforce against B according to the nature of the beneficial interest which the grantor had intended to confer on C. This assertion of the courts of equity restored at once the ancient system of uses, rendered it again possible to sever the legal from the equitable estate, and required only that in the form of the grant one equitable estate should be created which might be executed by the Statute of Uses, and that the grantee of such estate should be directed to hold it for the benefit of a second equitable grantee. This rule of the courts of equity is the foundation of our modern system of *trusts*.

READ: 2 Bl. Com., pp. 268–272, 332–337;
4 Kent Com., Lect. lxi, p. 294;
Bolles, Important English Statutes, p. 8, *Acts of Mortmain*, p. 32, *Statute of Uses*, p. 38, *Act of Enrollment*;
Barbour, Rights of Persons and Property, pp. 361–368;
Tiedeman, Real Property, §§ 441–470;
Rice, Real Property, §§ 205–210;
Kirchwey, Readings on the Law of Real Property, pp. 140–178;
Boone, Real Property, §§ 151–156;
Tiffany, Real Property, §§ 82–90.

§ 75. Of Seisin under the Modern Law of Real Property.

Although the Statute of Uses has rendered livery of seisin unnecessary, and substituted for it the delivery of a deed of the equitable estate, yet seisin itself is still one of the distinctive char-

acteristics of a legal freehold estate in real property. A freeholder who has lost his seisin cannot vindicate his title in the courts of common law; nor, except by some special provision of the local law, can he create or convey a freehold; nor can his heir inherit; nor can his widow have her dower, unless at some time during the coverture her husband had temporarily regained his seisin. On the other hand a disseisor, though guilty of a wilful wrong, has all these rights by virtue of his apparent seisin until it is extinguished by the re-entry of the true freehold owner. The ancient doctrine that the law of seisin is in effect the law of real property thus remains unshaken, nor while our system of estates endures does it seem possible that its importance can be substantially diminished.

Rem. One of the most prominent differences produced in our modern law of real property by the influence of the Statute of Uses upon the doctrine of seisin is exhibited in the facility with which future legal estates of freehold can now be created. As an equitable estate can be created to take effect in the future, and as whensoever it does take effect the Statute of Uses instantly vests the seisin in the equitable grantee and thereby changes the equitable into a legal estate, no obstacle growing out of the doctrine of seisin now exists against the creation of a future legal freehold estate. Moveover, as no intermediate estate is necessary to support a future equitable estate, so will the legal estate into which it is to be transmuted by the Statute of Uses arise without reference to any preceding estate, provided only that the seisin which the grantor had created to serve the future equitable estate has been meanwhile preserved. When future estates are created in this manner by a will they are known as "*executory devises*"; when created by deed they are called "*executory interests.*"

READ: 2 Bl. Com., pp. 195–199;
4 Kent Com., Lect. lxi, pp. 295–299;
Walker, American Law, § 201;
Tiedeman, Real Property, § 795;
Jones, Real Property, §§ 119–140;
Rice, Real Property, § 379;
Boone, Real Property, §§ 21, 157;
Tiffany, Real Property, § 498.

§ 76. Of Entry.

The act by which the owner of a legal estate of freehold in lands asserts his seisin is known as "*entry.*" Entry consists in

going upon the land, or as near it as circumstances will permit, and making public claim thereto according to the nature of the claimant's estate therein. When the estate is created by livery of seisin or its equivalent the reception of the seisin by the grantee constitutes his entry. When the estate is otherwise created, or when it descends from a deceased ancestor, or when prior estates of freehold have determined, or when once having received the seisin the owner has since been disseised, a formal act of entry becomes necessary.

Rem. Entry results in the legal possession of the land by the owner, though his actual physical presence upon it may endure but for a moment, and though he may not even touch the land, if this be due to the forcible resistance of an unlawful intruder. The legal possession gained by entry extends to the entire area of the land to which the claimed estate pertains, although the owner in entering may merely place his foot upon a minute portion of the land; or, if this be prevented by an intruder, makes his claim to the entire area from as near a point as possible. A *wrongful entry by a disseisor,* on the contrary, is not effective to vest the seisin in him unless he actually goes upon the land, and so occupies the whole of its area as to exclude the owner from every part thereof, or enters under an apparently valid conveyance in which the boundaries of the land claimed by him are clearly defined.

READ: 3 Bl. Com., pp. 174–179;
Boone, Real Property, § 411.

§ 77. Of Estates in Fee Simple.

An *estate in fee simple* is an estate so created as to be able to endure until the lineal and collateral heirs of the grantee are all extinct. This is the largest possible estate. It includes all others and is the sum of all. The owner may freely alienate it, or may create lesser estates out of it; and when these lesser estates have all expired the fee simple will still remain in him or his heirs. Of every article of corporeal real property a fee-simple estate may be predicated in some person; and if no other owner for it can be found the law presumes the State to be its owner till the contrary appears.

Rem. An estate in fee was formerly regarded as a series of life estates vesting in succession in the grantee and his heirs, and holders of such estates could neither alien nor incumber the land,

nor defeat the expectation of the heirs, nor prevent the ultimate reversion of the land to their grantor. Later, the privilege of aliening the entire future series of estates by the present holder was recognized in case he had purchased and paid for an estate in fee; and finally, every grantee in fee simple was considered as the owner of the whole series of estates and able to dispose of the inheritance at his pleasure, — thus depriving his heirs of all chance of its enjoyment and the grantor of any possible reversion. This change in the attitude of the law toward the estate requires the fee simple now to be defined as an estate so created that the owner may dispose of the entire interest in the property as he will, and that, if not disposed of, it will survive him and descend first to his lineal and then to his collateral heirs forever.

READ: 2 Bl. Com., pp. 104–107;
4 Kent Com., Lect. liv, pp. 1–5;
Barbour, Rights of Persons and Property, pp. 387–391;
Clark, Elementary Law, § 198 A;
Tiedeman, Real Property, § 36;
Kerr, Real Property, §§ 245–262, 263–320;
Pingrey, Real Property, § 278;
Rice, Real Property, §§ 34, 35, 40, 43, 44;
Kirchwey, Readings on the Law of Real Property, pp. 204–219;
Warvelle, Real Property, pp. 70, 71;
Boone, Real Property, §§ 15, 17, 18;
Tiffany, Real Property, §§ 19, 21;
Bolles, Important English Statutes, p. 16, *Act Quia Emptores.*

§ 78. Of the Creation of Estates in Fee Simple.

An estate in *fee simple may be created* by grant, or by devise, or by operation of law. To create an estate in fee simple by a *grant* the rule of the common law requires that the estate shall be granted, in so many words, to a person "*and his heirs,*" no other words being the legal equivalent of these; but some of our American States have departed from this rule. In a *devise* these words are not necessary when it is apparent from the whole will, taken together, that the testator intended to confer a fee simple. A *fee simple arises by implication of law* (1) Where a use is granted in fee simple and the legal estate which is to serve it is not properly described as also a fee, — the law in such a case not suffering the equitable estate to fail for want of a sufficient legal estate to support it; (2) When a disseisor maintains his adverse possession until all rightful owners are precluded by the Statute of Limitations from enforcing their own titles, — in which case,

since no other fee-simple estate can be asserted, the law presumes that the disseisor has the fee.

Rem. Under the common-law rule the grant of an intended fee simple which omits the words "and his heirs" creates only a life estate in the grantee. The departures from this rule in our American States have not been uniform. In some States equivalent phrases are admitted to have the same effect as the technical words above required. In others, every grant is presumed to confer a fee simple unless the words of the instrument designate a lesser estate. Certain States recognize an estate for years which still has a prescribed period to run as clothed with the attributes of a fee simple. These modifications of the general rule, made perhaps to avoid individual cases of hardship, have introduced great confusion into a subject which, above all others, should be uniform and clear. The character of a fee-simple estate is not affected by the annexation to it of a qualification or condition which may lead to its termination before its natural duration would expire.

READ: 2 Bl. Com., pp. 107–110;
4 Kent Com., Lect. liv, pp. 5–10;
Washburn, Real Property, §§ 147–157, 636;
Barbour, Rights of Persons and Property, pp. 392–394;
Walker, American Law, § 138;
Tiedeman, Real Property, §§ 37–39;
Kerr, Real Property, §§ 250, 321–338, 419–429, 439–451;
Pingrey, Real Property, §§ 279–284;
Rice, Real Property, §§ 38, 39;
Kirchwey, Readings on the Law of Real Property, pp. 219–230;
Warvelle, Real Property, pp. 262–267;
Boone, Real Property, §§ 16, 410;
Tiffany, Real Property, § 20.

§ 79. Of Estates in Fee Tail.

An *estate in fee tail* is an estate so created as to be able to endure until the lineal heirs of the grantee are extinct. The technical words used in creating this estate are "*heirs of his body.*" These words convey an *estate in tail general.* An estate in *special tail* is created by the words "*heirs of his body begotten upon his wife A.*" Limitations may be further made, confining the grant to the heirs male or to the female heirs, by inserting the adjective denoting the gender. In deeds no other words can take the place of these; but in wills such expressions as "*seed,*" "*issue,*" "*children,*" and the like are recognized as equivalents. These estates

have no particular advantages under our modern land system, and are not generally recognized in this country. In some of our States they have been abolished by statute, and a grant or devise of a fee tail in words creates a fee simple either in the first grantee or his immediate descendants. A *use limited in fee tail*, however, is protected and enforced according to the express direction of the grantor.

Rem. The original conception of an estate tail like that of a fee simple was of a series of life estates vesting successively in the grantee and the designated heirs. This conception developed later into that of a life estate residing in the first grantee until he had an heir born capable of succeeding him under the grant, and then enlarging into an estate of inheritance in him which he could convey to third parties, thus defeating the expectations both of his heirs and his reversioners. This estate was called a *conditional fee;* that is, a life estate conditioned to enlarge into a fee on the birth of an heir. At this stage of its development it was arrested by the Statute of Westminster the Second in A. D. 1285, which provided that estates granted to a person and his lineal heirs should at his death descend to them according to the terms of the grant, and then, if there were no such heirs surviving, should revert to the grantor. The estate was then called *feudum talliatum*, or fee tail, to characterize it as an estate in fee cut off from the larger fee, or fee simple. That portion of the Statute of A. D. 1285 which relates to these estates is known as the "*Statute De Donis Conditionalibus*," or "*Of Conditional Fees.*"

READ: 2 Bl. Com., pp. 110–119;
4 Kent Com., Lect. liv, pp. 11–20;
Washburn, Real Property, §§ 173–183, 191–207, 214, 215, 219; and note;
Barbour, Rights of Persons and Property, p. 391;
Walker, American Law, § 153;
Tiedeman, Real Property, §§ 44–50, 52;
Kerr, Real Property, §§ 430–438, 452–552;
Pingrey, Real Property, §§ 285–288, 290;
Jones, Real Property, §§ 154, 155, 611–618;
Rice, Real Property, §§ 46–59;
Kirchwey, Readings on the Law of Real Property, pp. 231–252;
Warvelle, Real Property, pp. 71–73;
Boone, Real Property, §§ 23–32;
Tiffany, Real Property, §§ 22–29;
Bolles, Important English Statutes, p. 12, *Act De Donis.*

§ 80. Of Estates for Life.

An *estate for life* is an estate so created as to be able to endure for the life of its owner or that of some other specified person. An estate limited by the life of its owner is called simply a "*life estate*"; one limited for the life of another person is called an "*estate per auter vie.*" A life estate is a freehold and is governed by the doctrines relating to seisin and the Statute of Uses. It *may be created* either by operation of law, or by a grant or devise, or by implication of law. When created by *grant* the operative words required to define it depend upon the local law concerning the words necessary to create a fee, since if this requires the word "*heirs*" in creating a fee a grant without this word would be sufficient to confer a life estate; while where a fee could be created without words of inheritance, words limiting the estate to the life of the grantee or some other person would be necessary. In a *devise* the evident intention of the testator will control. A life estate arises by *implication of law* when, though its duration is not specified, it is created to serve a use which may continue for a lifetime. The estates for life which are created by *operation of law* are three: (1) Estates Tail after Possibility of Issue Extinct; (2) Estates by Curtesy; and (3) Estates in Dower.

Rem. An estate *per auter vie* may be directly created for the life of another person, or may arise by the transfer of an existing life estate to some person other than the one by whose life it is already limited. The owner of an estate *per auter vie* is known as the "*tenant per auter vie*"; the person to whose life the estate is limited is called the "*cestui que vie.*" If the *cestui que vie* dies before the *tenant per auter vie,* the estate of course ceases. But if the tenant dies before the *cestui que vie,* the estate continues, though the owner no longer exists. In this event the law formerly gave any person a right to appropriate the estate and hold it as a "*general occupant,*" but it is now usually regarded as vesting in the personal representatives of the deceased tenant. When an estate *per auter vie* is granted to the tenant and his heirs his heir, grantee, or devisee will hold it after his death if it survives him, as a "*special occupant.*" The fact that a life estate may be *defeated by a future contingency* does not affect its legal character. Thus a grant to a woman during her widowhood gives her an estate for life, though it may terminate when she marries.

READ: 2 Bl. Com., pp. 120, 121, 258–260;
4 Kent Com., Lect. lv, pp. 23–27;

Washburn, Real Property, §§ 220–235;
Barbour, Rights of Persons and Property, pp. 395–397;
Clark, Elementary Law, § 199;
Tiedeman, Real Property, §§ 60–82;
Kerr, Real Property, §§ 553–577, 625–647;
Rice, Real Property, §§ 60–63;
Kirchwey, Readings on the Law of Real Property, pp. 253–258;
Warvelle, Real Property, pp. 73–75;
Boone, Real Property, §§ 33–35;
Tiffany, Real Property, §§ 30, 31.

§ 81. Of Estates in Tail after Possibility of Issue Extinct.

An *estate in tail after possibility of issue extinct* is an estate which was originally granted in special tail but which, on account of the death without living issue of one of the two persons from both of whom the special heirs must be descended, can now never be inherited but must terminate with the life of the present tenant in tail. This tenant is entitled to enjoy the land and its product as if he were a true tenant in fee, but any attempt on his part to alien it beyond his own lifetime will forfeit it to the reversioner. This estate has disappeared from our law with the estates tail from which it was derived.

Rem. The law recognizes the birth of issue as possible, whatever the age or incapacity of the designated parents, until that possibility is extinguished by their death. Hence it is only out of an estate in special tail that this peculiar life estate could arise; for a grantee in tail general, or even in tail male general, can never be without a possibility of issue, capable of inheriting, until his own life is extinct.

READ: 2 Bl. Com., pp. 124–126;
Washburn, Real Property, § 218;
Clark, Elementary Law, § 199;
Tiedeman, Real Property, § 51;
Pingrey, Real Property, § 289;
Tiffany, Real Property, § 34.

§ 82. Of Estates by Curtesy.

An *estate by curtesy* is the estate which a surviving husband has, by operation of law, in the real property of his deceased wife who, during their married lifetime, was seised of an estate in fee in such real property, and who also, during their married lifetime, had by him a child, born alive and capable of inheriting

the estate. To the existence of this estate *four conditions* must concur: (1) A valid marriage between the parties; (2) Ownership by the wife, during the marriage, of a legal or equitable estate in fee; (3) If her estate were a legal estate in corporeal real property either she, or her husband for her, must have been seised of the property at some time during the coverture, or if the estate were equitable, or the property were incorporeal, she or her husband for her must have claimed and enjoyed their rights therein, during the coverture, according to its nature; (4) A child who could inherit the estate must have been born alive to them during their married lifetime, though the continuance of the child in life is immaterial. Upon the fulfilment of these conditions the husband becomes a *tenant by the curtesy initiate* and entitled to many of the privileges of ownership over his wife's estate; though he may subsequently forfeit it in favor of the wife by such misconduct on his part as results in a divorce *a vinculo*, or in favor of her heirs by an attempt on his part to create out of it an estate greater than his own. If not thus forfeited his estate becomes *consummate* upon her death, and thenceforth resides in him like any other life estate, and may be sold or mortgaged by him or taken by his creditors. At his death the property vests in the heirs of the wife as if no life estate had existed.

Rem. This estate was conferred by the law of England on the husband partly for his own benefit and partly for the sake of his children, the future heirs. The husband always receives it subject to the burdens which attend the inheritance, and may lose it by any contingency which would defeat the wife's estate. In this country it has undergone many statutory modifications and substitutions, for a knowledge of which recourse must be had to the current legislation of our individual States.

READ: 2 Bl. Com., pp. 126–128;
4 Kent Com., Lect. lv, pp. 27–35;
Washburn, Real Property, §§ 313–354;
Barbour, Rights of Persons and Property, pp. 397–400;
Walker, American Law, §§ 107, 186;
Andrews, American Law, § 600;
Clark, Elementary Law, § 199;
Tiedeman, Real Property, §§ 101–110;
Kerr, Real Property, §§ 705–888;
Pingrey, Real Property, §§ 340–354;
Rice, Real Property, §§ 102–117;

Kirchwey, Readings on the Law of Real Property, pp. 263–268;
Warvelle, Real Property, pp. 81, 82;
Boone, Real Property, §§ 44–51 *d*;
Tiffany, Real Property, §§ 204–212.

§ 83. Of Estates in Dower.

An *estate in dower* is the estate which a surviving wife has, by operation of law, in one third of the real property of her deceased husband who, during their married lifetime, was seised of such an estate in fee in that real property as her children by him, if she had any, could have inherited. To this estate *three conditions* must concur: (1) A valid marriage between the parties: (2) Ownership by the husband, during the marriage, of a legal or equitable estate in fee, which the issue of the marriage could inherit: (3) Seisin either in fact or in law of the property by the husband during the coverture, if it were subject to seisin, or if not then such dominion over it as would have been equivalent to seisin if the property had been legal and corporeal. The birth of issue of the marriage is not necessary. When these conditions have been fulfilled the right of the wife to her future dower becomes *inchoate*, and cannot be defeated by any subsequent act of the husband, or his creditors, or other parties claiming under him. But it is not as yet a *vested right* which is beyond the influence of changes in the law, nor is it property which she can transfer to third parties by a deed, though she may *estop herself* from claiming it by joining in a conveyance with her husband. At the death of the husband her right becomes *consummate*, and is then perfected by assigning to her a definite portion of his estate. This may be done voluntarily by the heirs or grantees of the husband, or by an officer of the court having jurisdiction over his estate. The property assigned to her must, if possible, be of productive value; if it be land, it must be designated by metes and bounds; if indivisible or incorporeal the income may be apportioned, or the whole property be sold and her share of the proceeds allotted to her. Pending the assignment of dower she is entitled to her *quarantine*, which consists in the right to occupy the family residence and be supported out of the estate. The wife may *forfeit* her right to dower by an adulterous elopement, or by divorce *a vinculo* with alimony.

Rem. The right of a wife to dower, like that of a husband to curtesy, has been changed in many details in this country by local laws. Both dower and curtesy contemplate landed property as the principal wealth of the family, and are evident attempts to secure its benefits to the surviving members of the family after the death of its actual owner. Landed property now occupies an inferior rank in this regard, and the reason for these estates is no longer imperative. Hence in some of our States they have given place to statutory provisions in favor of surviving wives and husbands which bear little resemblance, except in purpose, to these ancient life estates. In other States dower and curtesy are retained by name and in their general features, but the scope and character of the rights which they involve not only vary in different localities but change from time to time with advancing ideas of marital privileges and obligations.

READ: 2 Bl. Com., pp. 129–136;
4 Kent Com., Lect. lv, pp. 35–47, 61–72;
Washburn, Real Property, §§ 335–417, 453–490;
Barbour, Rights of Persons and Property, pp. 400–408;
Walker, American Law, §§ 107, 180–183, 185;
Andrews, American Law, § 600;
Clark, Elementary Law, § 199;
Tiedeman, Real Property, §§ 115–146;
Kerr, Real Property, §§ 889–1090;
Pingrey, Real Property, §§ 355–374, 411–428;
Rice, Real Property, §§ 77–85, 89–93;
Kirchwey, Readings on the Law of Real Property, pp. 268–280;
Warvelle, Real Property, pp. 77–81;
Boone, Real Property, §§ 52–62 *a*, 66 *b*–71 *b*, 594–610;
Tiffany, Real Property, §§ 179–203.

§ 84. Of Estates in Lieu of Dower.

To enable a husband to avoid the restrictions, imposed upon his estate by the right of his wife to dower, *estates in lieu of dower* have been devised and introduced into the law. These are: (1) Jointures; (2) Ante-nuptial and Post-nuptial Settlements; (3) Testamentary Provisions. A *jointure* is an estate granted before the marriage either to the prospective wife alone, or jointly to her and her intended husband, providing for her a competent livelihood of freehold out of lands and tenements, to take effect in profit or possession immediately after the death of the husband and to continue during the remainder of her life. When this estate is expressly declared in the grant to be in lieu of dower, and is accepted as such by the prospective wife

without fraud on the part of the husband, it operates at once to discharge all his other property from any claim of dower. An *ante-nuptial settlement* is an agreement made before marriage between the intended wife and husband whereby, in consideration of other property then conveyed or secured to her, she from that moment relinquishes her right to dower. A *post-nuptial settlement* may have the same effect in equity. *Testamentary provisions* are gifts by the husband to his wife, by his last will and testament, in lieu of dower. These, if accepted by her after his death, extinguish her right to dower.

Rem. Estates in lieu of dower generally enjoy the same immunities from liability to the acts of the husband or the attacks of his creditors as the right of dower itself; and should such a provision fail by fraud or accident or defect of title the right of dower revives so far as the deficiency requires.

READ: 2 Bl. Com., pp. 136–139;
4 Kent Com., Lect. lv, pp. 48–60;
Washburn, Real Property, §§ 418, 490–519;
Barbour, Rights of Persons and Property, pp. 408–414, **557–559**;
Walker, American Law, § 184;
Andrews, American Law, § 498;
Clark, Elementary Law, § 156;
Tiedeman, Real Property, §§ 147–149;
Kerr, Real Property, §§ 1091–1126;
Pingrey, Real Property, §§ 376–410;
Rice, Real Property, §§ 86–88, 94–101;
Boone, Real Property, §§ 63–66 *a*, 72–80;
Tiffany, Real Property, §§ 191–193.

§ 85. Of the Enjoyment of an Estate for Life.

The owner of an estate for life has a right to the *full enjoyment* of the property, with all its profits, during his estate; but with the exception of tenant in tail after the possibility of issue extinct, he has no right so to use it as to permanently impair the value of estates which succeed his own. He may take from the land such *wood*, not being timber trees, as he requires for fuel and for the repair of his tools and of the buildings and fences on the land, but not to sell nor to use elsewhere, nor even to exchange for other wood to be employed upon the land. He may work *mines* which are already open, appropriate the annual *crops*, and should his estate terminate between planting and harvest, without his own fault, the crops then growing

belong to him and he or his representatives may cultivate them until they are ripe, and then remove them as *emblements*. He may also *lease* the property to undertenants, who will have the same right to emblements as himself; or may *mortgage or sell* his own estate, or render it liable to be taken on *execution* by his creditors, or may *insure* it on his own behalf. It is his duty to pay the current *taxes* and assessments against the property, keep down the interest on *incumbrances*, preserve the property in reasonable *repair*, and bear the entire expense of any *improvements* he may make upon it. Any injury he may inflict upon the property which permanently impairs its value is *waste*, and may be stopped by injunction or result in an action for damages, or in the forfeiture of his estate.

Rem. The *assertible seisin* of the land resides in the life tenant, and during the continuance of his estate the seisin of the reversioner is dormant; no new estates requiring livery of seisin can be created in the property; nor can any other estates in dower or curtesy arise out of the inheritance; nor is the owner of the fee affected by the entry of an intruder claiming title and ejecting the life tenant from the land. A reversioner may, however, *assign* his interest in the land pending an estate for life, and with it all its incidental rights and remedies.

READ: 2 Bl. Com., pp. 122–124;
4 Kent Com., Lect. lv, pp. 73–75;
Washburn, Real Property, §§ 236–312;
Barbour, Rights of Persons and Property, pp. 426–430;
Walker, American Law, § 139;
Andrews, American Law, §§ 598, 599;
Tiedeman, Real Property, §§ 72–82;
Kerr, Real Property, §§ 578–624, 648–704;
Smith, Personal Property, §§ 13–16;
Pingrey, Real Property, §§ 293–322;
Rice, Real Property, §§ 64–76;
Kirchwey, Readings on the Law of Real Property, pp. 258–263;
Warvelle, Real Property, pp. 75–77;
Boone, Real Property, §§ 36–43, 113–120;
Tiffany, Real Property, § 32.

§ 86. Of Estates at Will.

An *estate at will* is an estate so created as to be able to endure until terminated by the act of one of the parties thereto. This estate may arise either by express grant or by implication of law. When *created by express grant* it must clearly appear that

the estate is to be held *at will*, for the law does not favor this estate and will, if possible, construe the grant as the conveyance of a more stable interest in the land. An estate at will *arises by implication of law* whenever one person enters upon and occupies the land of another neither claiming a freehold title in himself, nor having received from the owner any specified estate, nor paying rent at any stated periods of time. Anciently, the right to terminate the estate resided in the lord alone; later it became equally the privilege of either party. The *landlord may extinguish it* by entering and evicting the tenant, or by conveying the land to a third party, or by creating in it estates inconsistent with the estate at will. The *tenant may terminate it* by permanently abandoning the property. It ceases also with the death of either party. During its continuance the *tenant has the full enjoyment* of the land, and may take wood for repairs and fuel, work open mines, underlet to third parties, and raise and gather crops, and if his estate ceases between planting and harvest, without his fault, he can claim the emblements.

Rem. An estate at will, is at best, but a mere *scintilla* of interest, a transitory right to possess land and enjoy its benefits; not such an estate as the tenant can convey or even vindicate against the landlord in a court of law. Although such estates are sometimes now created, they have largely given place to the equally convenient but more permanent and flexible estates, known as "*estates from year to year.*"

READ: 2 Bl. Com., pp. 145–150;
4 Kent Com., Lect. lvi, p. 111;
Washburn, Real Property, §§ 762–796;
Barbour, Rights of Persons and Property, pp. 440–442;
Walker, American Law, § 144;
Andrews, American Law, § 603;
Clark, Elementary Law, § 200;
Tiedeman, Real Property, §§ 212–216;
Kerr, Real Property, §§ 1378–1414;
Pingrey, Real Property, §§ 616–627;
Rice, Real Property, § 151;
Kirchwey, Readings on the Law of Real Property, pp. 290–295;
Warvelle, Real Property, pp. 89, 90;
Boone, Real Property, §§ 121–123;
Tiffany, Real Property, §§ 54, 55.

§ 87. Of Estates from Year to Year.

An *estate from year to year* is an estate so created as to be able to endure for at least one year, and unless then terminated, by the act of one of the parties, to continue for a second year, and so onward year after year until thus determined. This estate was developed out of estates at will by custom and judicial legislation. The inconvenience attending the sudden and unexpected termination of estates at will early gave rise to a custom of requiring either party to *give timely notice* to the other of his intention to determine the estate at a definite future date. Where rent was reserved payable annually, or where the lands were agricultural and the interests of the tenant required that he should be permitted to remain and complete his agricultural year, custom adopted the end of the year as the date when such notice must be made to take effect. Out of these customs grew the presumption that whenever one person occupies the land of another without a lease declaring the duration of his estate, but paying rent yearly or at aliquot parts of a year, the estate intended by the parties was an estate from year to year, terminable by either party at the end of any year by giving reasonable notice to the other. This presumption received the judicial sanction of the courts, and thus gave to these new customary estates an established position before the law. Estates from year to year are true estates, may be enforced in law, are assignable by the tenant, and at his death vest in his personal representatives. During their existence the tenant has the *same enjoyment* of the land as a life tenant, but cannot claim the crops which he has planted unless they ripen and are gathered before the termination of his estate.

Rem. How long before the proposed termination of an estate from year to year *the notice* must be given may be prescribed by the agreement of the parties, or by local custom, or by reasonable intendment of law. Where no other rule prevails notice should be given on the rent day next preceding the close of the year. Akin to these estates are other interests in lands for longer or shorter periods, as from *month to month*, week to week, or quarter to quarter, which are recognized in some localities where custom has established these as rent periods, with the privilege in either party to terminate the estate at any rent day by giving notice on the rent day next preceding.

READ: 2 Bl. Com., p. 147, note;
4 Kent Com., Lect. lvi, pp. 112–116;
Washburn, Real Property, §§ 797–824;
Barbour, Rights of Persons and Property, pp. 443–446;
Andrews, American Law, § 605;
Clark, Elementary Law, § 200;
Tiedeman, Real Property, §§ 217–219;
Kerr, Real Property, §§ 1415–1458;
Pingrey, Real Property, §§ 628–646;
Rice, Real Property, § 153;
Boone, Real Property, §§ 124–124 *a*;
Tiffany, Real Property, §§ 57–59.

§ 88. Of Estates for Years.

An *estate for years* is an estate so created as to begin and end at certain specified dates. It is called a *term*, from *terminus*, on account of its predetermined duration which may be for a day, a year, a century, or any other fixed period. It is created by an express grant, called *a lease*, and may be made to take effect immediately or at any designated future time. The *rights and privileges* of a tenant for years are substantially the same as those of a tenant for life, except when varied by the provisions of his lease. He may take wood for fuel and repairs, work open mines, erect and remove buildings, raise and gather crops, and if his estate terminates, without his fault or its own limitation, between planting and harvest he may continue to cultivate and appropriate his annual crops. He may also *assign or underlet*, and if he dies before his estate ceases it will vest in his personal representatives. His principal obligations are to pay his stipulated or customary *rent*, keep the premises in suitable *repair*, and surrender them to the landlord at the expiration of his term. He is liable for *waste*, actual or permissive, not only to the landlord but to any third person who may suffer from the ruinous condition of the premises.

Rem. An estate for years may exist in either of three stages: (1) The *contract stage*, which continues from the making of the lease to the date fixed for the commencement of the estate; (2) The *interesse termini*, which continues from the date fixed for the commencement of the estate to the date when the tenant enters and takes possession; (3) The *perfect stage*, which continues from the entry of the tenant to the end of the estate. During the contract stage the tenant has no estate in the land, but

all possessory rights thereto reside in the landlord. During the *interesse termini* the tenant has a right to immediate possession, but the actual possession still vests in the landlord and remedies for injuries to it must be instituted by him. During the perfect stage the tenant has the actual possession and may sue for all injuries thereto which do not exclusively affect the rights of the reversioner.

READ: 2 Bl. Com., pp. 140–145;
4 Kent Com., Lect. lvi, pp. 85–110;
Washburn, Real Property, §§ 605–761;
Barbour, Rights of Persons and Property, pp. 432–439;
Walker, American Law, §§ 140–143;
Andrews, American Law, §§ 601, 602;
Clark, Elementary Law, § 200;
Tiedeman, Real Property, §§ 171–200;
Kerr, Real Property, §§ 1127–1377;
Pingrey, Real Property, §§ 478–600;
Rice, Real Property, §§ 118–150;
Kirchwey, Readings on the Law of Real Property, pp. 281–289;
Warvelle, Real Property, pp. 84–89, 391–398;
Boone, Real Property, §§ 12 *b*, 81–105 *c*, 106–112 *a*;
Tiffany, Real Property, §§ 35–53.

§ 89. Of Estates by Sufferance.

An *estate by sufferance* is an estate which exists by implication of law in one who wrongfully continues in possession of real property after the estate, by virtue of which he obtained the rightful possession, has terminated. Such an estate is that of a tenant *per auter vie*, who holds over after the death of the *cestui que vie*, or a tenant for years who fails to vacate the premises when his lease expires. But though his possession is wrongful the occupant is *not a trespasser* until the landlord enters to evict him, and in the meantime he may defend his possession against all intruders. He has no right to take the profits of the soil, nor, when expelled, to gather the crops which he has planted since his original estate determined. He is not entitled to notice to quit, and could once have been summarily and forcibly ejected at the will of the landlord; but such violent measures are not now permitted, and if he does not retire upon the entry of the landlord the latter must seek his remedy in an action at law. The landlord may treat the wrongful possession as an offer of the tenant to renew the lease, and by accepting the offer and receiving rent may convert the estate by sufferance into an estate from year to year.

Rem. An estate by sufferance is not a true estate, but belongs rather to that class of interests in real property which are known to our modern law as *quasi estates*. *Quasi* signifies resemblance with differences; as in the phrases "*quasi contract*," or "*quasi corporation*," which denote legal entities similar to but not identical with contracts and corporations. Thus a *quasi* estate has some of the attributes of a true estate and is wanting in others; the estate by sufferance, for example, containing an actual possession with a right of possession against strangers but neither ownership nor a possessory right against the landlord. Other instances of *quasi* estates are: (1) *Possibility of Reverter*, which is a right residing in the grantor of a fee simple and his heirs to claim the reversion in the granted property in case the fee simple so granted should chance to fail, — as where the grantee is a charitable corporation which is afterward dissolved, or where the purpose of the grant is satisfied without exhausting the property; (2) *License*, which is a permission given by the owner of property to another person to do some act or enjoy some privilege therein, and which is entirely personal between the parties, is not assignable, and is revocable by the death of either party, or at the will of the licensor except in cases where his conduct has estopped him from revoking it until its object is accomplished; (3) *Rights arising by Estoppel*, which are rights in property enforcible against particular individuals only, and against them because of some wrongful action or omission which now legally prevents them from denying that such rights exist, — as where the owner of land knowingly permits an innocent party to purchase it in good faith and for valuable consideration from a person having an apparent but not an actual title to the land, and is on that account forbidden by the law to assert his own valid title against the invalid title thus acquired. *Quasi* estates are protected by the law, according to the nature and scope of the ingrediental rights which they contain, equally with the true estates before described.

READ: 2 Bl. Com., pp. 150, 151;
3 Kent Com., Lect. lii, pp. 452, 453;
4 Kent Com., Lect. lvi, pp. 116–118;
Washburn, Real Property, §§ 168, 170, 825–850, 1512, 1889–1943;
Barbour, Rights of Persons and Property, pp. 446, 447;
Walker, American Law, § 144;
Andrews, American Law, § 604;
Clark, Elementary Law, § 200;
Tiedeman, Real Property, §§ 225–228, 651–654, 724–731;
Kerr, Real Property, §§ 1459–1474, 2275;
Pingrey, Real Property, §§ 261–275, 647–659;
Jones, Easements, §§ 63–79;
Rice, Real Property, §§ 152, 154–159, 203, 254, 346–353;

Kirchwey, Readings on the Law of Real Property, pp. 296–299, 363–366;
Warvelle, Real Property, pp. 62, 63, 90, 91;
Boone, Real Property, §§ 125–127 *a*;
Tiffany, Real Property, §§ 60–63, 116, 117, 304, 456, 457.

Article IV

Of Absolute and Conditional Estates in Real Property

§ 90. Of Estates upon Condition.

Estates, whatever their duration, are either absolute or conditional. An *absolute estate* is an estate whose existence is independent and unqualified. A *conditional estate* is an estate so created as to come into existence, or be enlarged or be defeated, upon the happening or not happening of some contingent event. Where a condition must be fulfilled before the estate can come into existence or be enlarged, it is called a *condition precedent;* and if its fulfilment should be impossible or unlawful the estate can never vest or be enlarged. Where the fulfilment of a condition would destroy an estate already vested it is a *condition subsequent,* and if the performance of this condition be impossible or unlawful the estate can never be defeated. Some conditions are *implied by law* from the nature of the estate to which they are attached, as that a tenant of lands shall not commit waste, or that the grantee of an office shall perform its duties. Other conditions exist only when *expressed* in the grant creating the estate. A condition once annexed to an estate *follows it* through all changes of ownership until it is fulfilled, released, or extinguished by the act of the parties or of the law.

Rem. Under the feudal law all estates were conditional, being held by the tenant upon the rendition of stipulated or customary services. The relation between the lord and the tenant was known as *tenure,* and the tenures differed with the conditions imposed upon the tenant and the legal dignity of his estate. Such tenures were once of great variety, but gradually disappeared with the decay of the feudal system, until with a single exception all lay freehold tenures were abolished in A. D. 1660 by the Statute 12 Charles II. In this country feudal tenures never existed. All tenure is "*allodial*"; which signifies that

estates are free from feudal burdens and are held under no feudal superior. Conditional estates indeed exist, but the conditions originate in contract between the parties, and characterize or qualify the estates to which they are attached but not the tenure under which the estates are held.

READ: 2 Bl. Com., pp. 152–154;
4 Kent Com., Lect. lvii, pp. 121–126;
Washburn, Real Property, §§ 935–950;
Barbour, Rights of Persons and Property, pp. 303, 304, 448–461;
Walker, American Law, § 152;
Andrews, American Law, § 617;
Clark, Elementary Law, § 202;
Tiedeman, Real Property, §§ 271–276;
Kerr, Real Property, §§ 218–225, 1873–1893;
Pingrey, Real Property, §§ 39–41, 736–746;
Rice, Real Property, §§ 20–29, 278–288;
Kirchwey, Readings on the Law of Real Property, pp. 78–139, 300–315;
Warvelle, Real Property, pp. 106–114;
Boone, Real Property, §§ 22, 202–208;
Tiffany, Real Property, §§ 64–70;
Bolles, Important English Statutes, p. 86, *Act 12 Charles II, ch. 24, Abolishing Feudal Tenures.*

§ 91. Of the Fulfilment and Breach of Conditions.

The occurrence of the event which constitutes a condition precedent is called the *fulfilment* of the condition; the happening of the event which forms a condition subsequent is called a *breach* of condition. Neither the fulfilment nor the breach of a condition of itself either vests or defeats the conditional estate. Where a condition precedent is fulfilled the person in whom the estate is now ready to vest *must enter* and assert his right, or the property will remain in the former owner. When a condition subsequent is broken the person in whose favor the estate is now forfeited must take possession and *evict* the owner of the conditional estate, or he will continue to enjoy it as before the breach occurred.

Rem. As the breach of a condition subsequent creates nothing, but simply destroys an existing estate, it necessarily enures only to the benefit of him out of whose estate the conditional estate was carved, — that is, the grantor and his heirs, — and none but these can enter and assume possession of the land. The common law did not allow them to assign this right, since that would be the transfer of a possible litigation, and hence until they intervened the grantee of the conditional estate con-

tinued in possession undisturbed. Where the conditional estate is less than a fee simple our modern law permits the grantor to *assign* his possible reversion, and with it the right to take advantage of the breach of condition.

READ: 2 Bl. Com., pp. 156, 157;
4 Kent Com., Lect. lvii, pp. 122, 123, 127;
Washburn, Real Property, §§ 951–969;
Tiedeman, Real Property, §§ 277–279;
Kerr, Real Property, §§ 1894–1905;
Pingrey, Real Property, §§ 746–776;
Jones, Real Property, §§ 708–999;
Rice, Real Property, §§ 291, 292;
Kirchwey, Readings on the Law of Real Property, pp. 358–363;
Warvelle, Real Property, pp. 114, 115;
Boone, Real Property, §§ 209–213;
Tiffany, Real Property, §§ 71–77.

§ 92. Of Estates in Mortgage.

One of the most important of estates upon condition subsequent was an estate in mortgage, as that estate existed at common law. A *mortgage estate* was an estate created by a debtor in favor of his creditor to secure the payment of the debt. For this purpose the debtor conveyed to the creditor an immediate estate in fee, conditioned to be void if the debtor paid the debt at a certain day, but otherwise to remain absolute in the creditor and his heirs forever. Between the date of the conveyance and pay-day the creditor had the seisin of the inheritance with all its incidental rights of curtesy and dower. If the debt were paid at pay-day the estate of the creditor was instantly defeated, and the debtor could enter and take possession as of his former estate. If the debt were not paid at pay-day the debtor lost all right to pay it and redeem the land, and the estate of the grantor became indefeasible. Such was a mortgage at common law — a pure specimen of estates upon condition subsequent. When courts of *equity* were established, however, the nature of a mortgage underwent a gradual change. These courts maintained that a forfeiture arising from a mere delay in paying money was unreasonable, and undertook to protect the debtor against the loss of his estate by compelling the creditor to accept payment at a later day and release the land. The right thus vested in the debtor to make the payment after pay-day and redeem the land was called his "*equity of redemption,*"

and under the rules of equity could not be extinguished except by a new agreement between the parties or the decree of the court itself. When the creditor desired to enforce payment he was therefore obliged to apply to the court by a *petition for foreclosure,* upon which the court, after due hearing, fixed a day for payment, and if the debtor failed to pay upon that day he forfeited his equity of redemption, and the estate of the creditor became absolute in equity as well as in law. In like manner, when the debtor wished to pay and the creditor refused to receive payment, the debtor could bring his *petition to redeem,* with a similar result. It also seemed to courts of equity unreasonable that the debtor should forfeit the entire property for the non-payment of a debt of inferior value, and that justice to both parties required that he should receive only the amount of his claim with interest and costs. Hence arose the practice of selling the property on the decree of foreclosure; paying the debt, interest, and costs out of the proceeds; and returning the surplus to the debtor. Under these rules of equity a mortgage, though still having the form of a true estate, is nothing more than a *lien* upon the land, — that is, a right to have the land subjected to the payment of the debt by a foreclosure sale; the seisin and its incidental rights remaining always in the debtor till the sale occurs. The extent to which these changes have progressed is not uniform in our American States. In some, the creditor is still considered as holding a legal estate and is entitled to the seisin from the date of the conveyance. In others, he has an equitable estate but no seisin until after pay-day, and then may take possession of the land and retain it until foreclosure or redemption. In still others, the mortgage is nothing but a lien, to be made effective by a foreclosure sale. The tendency in all States is toward the adoption of the doctrine that the mortgage is a lien; that the debt secured is the principal thing and the mortgage is collateral to it; and that the mortgage like the debt is a chattel interest which passes with the transfer of the debt, and upon the death of the creditor goes to his executor and not to his heir.

Rem. Landed securities for debt assume many other forms beside the one above described. Among these are: (1) *Deeds of*

Trust, where the debtor conveys the land to third persons, with power to sell on his default of payment, and apply the proceeds to the cancellation of the debt; (2) *Vendor's Lien,* or the right of the vendor of real property to treat it as security for the purchase money, until the price is fully paid; (3) *Vendee's Lien,* or the right of the buyer of real property to treat it as security for any advance payments he may make while the title still resides in the vendor; (4) *Mechanic's Lien,* or the right of a person, who has incorporated his materials or labor into the land of another at its owner's request, to treat the land as security for the payment of his claim; (5) *Judgment Lien,* or the right of a judgment creditor to treat all lands owned by the debtor at the date of the judgment as security for its payment; (6) *Welsh Mortgage,* in which the creditor occupies the land of the debtor until the debt is paid, enjoying its use in lieu of interest on the debt; (7) *Vivum Vadium,* in which the creditor holds the land of the debtor, and applies the rents and profits to the payment of the principal and interest until the debt is paid; (8) *Estates by Statute Merchant and Statute Staple,* which are estates created for the protection of tradesmen, and conferring the same rights as the *vivum vadium;* (9) *Estates by Elegit,* which is an estate of *vivum vadium* created by the levy of an execution on one half of the lands of the debtor. The first five of these require a sale or foreclosure to render them effectual. The remaining four operate of themselves to satisfy the debt. A creditor having possession of the land of his debtor under any of these forms of security is obliged to keep it in proper condition, account for its rents and profits and apply them on the debt, and surrender the property to the debtor when the debt is paid.

READ: 2 Bl. Com., pp. 157–162;
4 Kent Com., Lect. lviii, pp. 136–194;
Washburn, Real Property, §§ 974–1184;
Barbour, Rights of Persons and Property, pp. 461–470, 483–497;
Walker, American Law, §§ 154, 155–160, 173;
Andrews, American Law, §§ 617, 793;
Clark, Elementary Law, § 202;
Tiedeman, Real Property, §§ 287–376, 647, 648;
Kerr, Real Property, §§ 2030–2173;
Jones on Mortgages, §§ 1–16, 58, 59, 62;
Pingrey, Real Property, §§ 759–988;
Rice, Real Property, §§ 293–324;
Kirchwey, Readings on the Law of Real Property, pp. 402–406, 525–529;
Warvelle, Real Property, pp. 116, 117, 365–391, 398–408;
Boone, Real Property, §§ 215–245;
Tiffany, Real Property, §§ 110–112, 506–577.

§ 93. Of Limitations.

A *limitation* is an estate which somewhat resembles an estate upon condition subsequent in the form of the grant, but differs from it entirely both in its nature and its effect. It is an estate so created as to endure while a certain state of circumstances exists, and subject to be defeated should a change in such circumstances occur before it would otherwise expire. Thus an estate granted to a woman as long as she remains unmarried will continue for her life unless she marries, but if she marries will at once determine. Such an estate is not, however, regarded by the law as an estate for life upon condition subsequent, to be forfeited by marriage and requiring an entry by the grantor to regain his former estate. On the contrary, her marriage legally terminates the state of circumstances which the grant had fixed as the duration of her estate, and her estate, therefore, *ipso facto* ceases, leaving the reversioner in complete dominion of the land.

Rem. Some confusion exists as to the names applied to this estate. By Blackstone and other writers it is called simply "a *limitation.*" Lyttleton styles it "a *condition in law*"; Kent, "a *collateral limitation*"; Washburn, "a *conditional limitation.*" When the estate granted is a fee it is denominated "a *qualified fee,*" or "a *base fee,*" or a "*determinable fee.*" Each of these names expresses some essential attribute of the estate, but none of them correspond precisely with its legal definition.

READ: 2 Bl. Com. pp. 155, 156;
4 Kent Com., Lect. lvii, p. 129;
Washburn, Real Property, §§ 164–172, 970, 971;
Tiedeman, Real Property, §§ 280, 281;
Pingrey, Real Property, §§ 757, 758;
Rice, Real Property, §§ 289, 290;
Tiffany, Real Property, §§ 78–81.

§ 94. Of Conditional Limitations.

A conditional limitation is another estate which resembles in some respects an estate upon condition subsequent but which differs from it in its essential character. A *conditional limitation* is an estate granted at the same time with, but to take effect after, a preceding estate in case the preceding estate should be prematurely determined by the breach of some condition upon which it is held. Thus, where an estate is granted to a woman for life provided she remains unmarried, and in case of her mar-

riage to vest in her eldest unmarried sister, the sister's estate would be a conditional limitation. This is not an estate upon condition subsequent, because the breach of the condition enures to the benefit of a third person and not of the grantor and his heirs; but is an estate limited to take effect after the termination of a particular estate which, in the absence of the limitation over, would have been an estate upon condition. It is not a particular estate followed by a contingent remainder, because the law does not allow a contingent remainder to be limited upon a contingency which abridges the particular estate. It is a peculiar estate, of comparatively recent origin, and appears most frequently in wills, where it affords testators great facility in providing alternate or substitute estates to meet the changing fortunes of their prospective families.

Rem. Conditional limitations can exist only as *equitable estates,* or as legal estates vesting under the Statute of Uses. They are created by providing in the grant of the first estate that, upon a breach of the condition, a use shall spring up in the second grantee. This use, when it arises, is executed by the Statute annexing the seisin to the use, and immediately clothes the second grantee with the entire legal estate according to the terms of his conditional grant. The name *conditional limitation,* though variously used, properly applies only to the second estate; the first estate, considered apart from the second, being an estate upon condition subsequent.

READ: 2 Bl. Com., p. 155;
4 Kent Com., Lect. lvii, pp. 126–128;
Washburn, Real Property, §§ 972, 973;
Clark, Elementary Law, § 202;
Rice, Real Property, § 230;
Warvelle, Real Property, pp. 115, 116;
Boone, Real Property, § 214.

ARTICLE V.

OF PRESENT AND FUTURE ESTATES IN REAL PROPERTY

§ 95. Of Estate in Possession and Estates in Expectancy.

An estate in real property may be created either to take effect at once in ownership and possession, or its possession or ownership or both may be postponed until a future day. The former is called an *estate in possession;* the latter is known as

an *estate in expectancy*. Anciently, all estates — the life estate of the freeman and the estate at will of the serf — were estates in possession; the reversionary interest of the grantor being the only semblance of a future estate. Most estates are of this character at the present day, and in the very nature of the case there must be at all times, in every article of property, at least one estate which is an estate in possession. Estates in expectancy were devised to meet the requirements of more complex conditions of society, in which both instinct and interest demanded that provision should be made for the future support of families, while the doctrine of seisin restricted the power to do this within narrow limits. Of such estates there are now recognized by law: (1) Reversions; (2) Remainders; and (3) Executory Estates.

Rem. An estate may be expectant either as to its ownership or as to its enjoyment. The *enjoyment of an estate* consists in the actual pernancy of the profits, or the receipt of the rents and other advantages arising from the ownership of the property. An estate of any kind may be created to take effect hereafter in enjoyment, but only certain species of estates can be created to take effect in ownership in the future. An estate less than freehold, for instance, may be granted to come into existence in the future both in ownership and possession; as also may an equitable estate of freehold, or even a legal estate of freehold if it vests by virtue of the Statute of Uses. But a legal estate of freehold created by livery of seisin or its equivalent must take effect in ownership, either actually or by construction of law, immediately upon the act of livery, though its enjoyment may be postponed till after the cessation of some intermediate estate. This is a consequence of the nature of livery of seisin which, being an instantaneous act, must at once transmit the estate to the grantee.

READ: 2 Bl. Com., p. 163;
Washburn, Real Property, § 1508;
Barbour, Rights of Persons and Property, pp. 518–522;
Andrews, American Law, § 615;
Clark, Elementary Law, § 194;
Kirchwey, Readings on the Law of Real Property, pp. 316–320.

§ 96. Of Estates in Reversion.

An *estate in reversion* is the estate which remains in a grantor after he has granted a less estate than his own. By such a

grant the right of *enjoyment* passes to the grantee and resides in him during the existence of his estate; and when his estate expires this right reverts or returns to the grantor. As to its right of *ownership* the grantor's estate continues all the while in him unchanged. Hence the estate of the grantor is said to be *in reversion*, and he himself is called *the reversioner*. When the lesser estate determines the estate of the grantor ceases to be in reversion, and its enjoyment is again united with its ownership.

Rem. While his estate is in reversion the grantor can exercise no dominion over the property which is inconsistent with the rights embraced in the lesser estate. Thus, if the lesser estate is a freehold the grantor has no *assertible seisin* and cannot convey the property by any act which requires livery of seisin or its equivalent; but he may transfer his reversionary interest by an assignment, or may create new uses in it, and may protect it from waste at the hands either of the grantee or of strangers. If the lesser estate is less than a freehold, the *seisin remains in the grantor*, and he may create new legal estates of freehold in the property subject to the rights of the owner of the lesser estate. When the holder of the lesser estate is under an obligation to pay rent to the grantor, the right to rent is said to be *incident to the reversion*, but may be separated from it by the grantor and transferred either with or without it to a third person. It is sometimes stated that an estate in reversion "*arises by operation of law*"; that it is an "*incorporeal hereditament*," etc. None of these statements are correct. The estate is the original estate of the grantor, shorn temporarily of its right of enjoyment, not in any sense a new estate; nor is the character of the property changed from corporeal to incorporeal.

READ: 2 Bl. Com., pp. 175–177;
4 Kent, Com., Lect. lxiii, pp. 353–356;
Washburn, Real Property, §§ 1509–1525;
Barbour, Rights of Persons and Property, pp. 535–538;
Walker, American Law, § 145;
Clark, Elementary Law, § 196;
Tiedeman, Real Property, §§ 385–389;
Pingrey, Real Property, §§ 989–993;
Rice, Real Property, §§ 251–258;
Kirchwey, Readings on the Law of Real Property, pp. 321–325;
Warvelle, Real Property, pp. 95–97;
Boone, Real Property, §§ 184–188;
Tiffany, Real Property, §§ 113–115.

§ 97. Of Estates in Remainder.

An *estate in remainder* is an estate which is so created as to take effect in ownership or possession at the termination of another estate which is created by the same grant. A *remainder* is, in itself, the whole or a part of that reversionary interest which would legally have remained in the grantor after he had created the lesser estate. This he could transfer by assignment after the lesser estate was created. But if the lesser estate were a freehold, and the purpose of the grantor were to convey another freehold to take effect after the first, this he could not do after the creation of the first estate because his own seisin had now become unassertible, and he could make no livery of seisin to a second grantee. Thus in order to create one freehold, to come into existence either in ownership or possession after another, it was necessary to create them both by the same grant and to make one act of livery of seisin on behalf of both estates. For the same reason, the second freehold must be so created as to take effect immediately upon the termination of the first estate, since otherwise the seisin of the grantor would revive under his reversionary right, and could not then be severed from it without another grant and livery. This relation of the first estate to the second, as receiving and upholding the seisin on its behalf until the time arrives when its owner can assert his own seisin, has given to the first estate its legal character as not only a *preceding* but a *supporting* estate, without which no freehold remainder can be created. Any number of freeholds may thus be limited to take effect in succession, and as to each of these all those which precede it bear the relation of supporting estates. Remainders are of two classes: (1) Vested Remainders; and (2) Contingent Remainders. A *vested remainder* takes effect in *ownership* at the time of the creation of the preceding estate, and in *possession* at the time when the preceding estate determines. A *contingent remainder* does not take effect either in possession or in ownership at the time of the creation of the preceding estate, and should the preceding estate expire before the occurrence of the contingency, on which the remainder is limited, the seisin will revive in the grantor and the remainder will fail.

Rem. The law defining and governing estates in remainder originated and developed under the strict doctrine of seisin, as applied to freehold legal estates so granted as to take effect at once in ownership in their respective grantees, their possession only being deferred till the preceding estates expired. To such estates all the fundamental rules governing remainders are fully applicable. When similar methods came to be employed for the creation of future estates less than freehold, and freehold remainders and remainders less than freehold were alternated in the same series of estates; and still later, when attempts were made to create remainders of freehold in favor of persons yet unborn, or not now capable of taking ownership, or not intended by the grantor to receive the estate except in certain contingencies, — the same rules were applied to them as far as their nature would admit, and modifications were introduced to meet their varying conditions.

READ: 2 Bl. Com., pp. 164–168;
4 Kent Com., Lect. lix, pp. 197–202;
Washburn, Real Property, §§ 1526–1540;
Barbour, Rights of Persons and Property, pp. 523–526;
Walker, American Law, § 146;
Clark, Elementary Law, § 195;
Tiedeman, Real Property, § 396;
Rice, Real Property, §§ 227–229, 238–244;
Warvelle, Real Property, pp. 92–95;
Boone, Real Property, § 172;
Tiffany, Real Property, §§ 118, 119.

§ 98. Of Vested Remainders.

A *vested remainder* is a remainder so created that, from the commencement to the close of the preceding estate, its seisin can be instantly asserted in case the particular estate should be determined. This can be true only when the remainder is limited to a definite person, who is in being and is capable of taking at the time of the grant. Such a remainder though vested at once in ownership is by no means certain ever to become vested in enjoyment. Thus while a grant to B for life, remainder to C for life, both being living persons, creates a vested remainder in C because he immediately becomes its owner; yet C may die before B dies, in which event C's remainder ceases without having been enjoyed. "It is the present capacity of taking effect in possession if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines"

which characterizes a vested remainder. Vested remainders, like reversions, can be assigned by their owners or conveyed to uses, and in their interest the property will be protected by the law from permanent injury while under the control of the particular tenant.

Rem. A vested remainder may be limited to take effect after a particular estate for years, even when the remainder is a freehold, for the delivery of possession to the lessee for years operates as a livery of seisin of the freehold to its grantee. But no remainder can be limited to take effect after a fee simple, since the grant of the fee simple necessarily exhausts the whole estate. When a particular estate ceases by its own limitation the seisin or possessory right of the remainder becomes assertible, and its owner can enter and enjoy his estate. But should the particular estate expire prematurely, by forfeiture for a breach of condition subsequent, the benefit of the forfeiture would enure to the grantor, in whom the seisin would then revest and the remainder would fail. The hardship of this rule of forfeiture has led to its modification by statute in some of our American States.

READ: 2 Bl. Com., pp. 166–168;
4 Kent Com., Lect. lix, pp. 202–206, 233–236;
Washburn, Real Property, §§ 1541–1554;
Barbour, Rights of Persons and Property, pp. 526–528;
Clark, Elementary Law, § 195;
Tiedeman, Real Property, §§ 397–400;
Pingrey, Real Property, §§ 994–1004;
Rice, Real Property, § 231;
Kirchwey, Readings on the Law of Real Property, pp. 326–333;
Boone, Real Property, § 173;
Tiffany, Real Property, §§ 120–122.

§ 99. Of Contingent Remainders.

A *contingent remainder* is a remainder so created that the particular estate may expire, by its own limitation, before the remainder can take effect in ownership or possession. This may occur in *four cases:* (1) Where the grantee in remainder, at the date of the grant, is not yet in being, or is not yet ascertainable, or is not yet capable of taking the estate, — as an estate for life to A with remainder to the son of B who as yet has no son, or to the eldest surviving son of B or to any son of B who may survive him; (2) Where the remainder is granted to take effect upon the happening of a future event which is

sure to happen at some time, but may not happen until after the termination of the particular estate, — as an estate to A for life with remainder to B after the death of C, for though C is sure to die, yet if he outlives A the remainder fails; (3) Where the remainder is granted to take effect upon a contingency which both terminates the particular estate and vests the remainder, — as an estate to A and his heirs until the marriage of B with remainder to B and his heirs forever, an estate which will never cease in A nor vest in B unless B marries; (4) Where the remainder is granted to take effect upon a contingency which has no relation to the particular estate, — as an estate to A for life with remainder to B upon his marriage to C, the duration of A's estate not being affected by the marriage but the remainder vesting in ownership when that event occurs. In these four cases the particular estate may expire and the seisin revert to the grantor before the remainder can take effect, and so the remainder may fail. But if before, or on the instant that, the particular estate determines the contingent event occurs, the remainder will vest in its grantee, its contingent character will vanish and it will become to all intents a vested remainder. Pending the contingency the estate in remainder, although it cannot vest even in ownership in its grantee, nevertheless exists and is regarded by the law as *in abeyance*, — its seisin meanwhile being represented by that of the particular estate. Hence, when the grantee of a contingent remainder is a person in being and definitely ascertainable, he may assign the remainder to another, or if the remainder be a fee it will descend like other inheritances, actual or contingent, to his heirs.

Rem. The law does *not permit remainders* to be limited to take effect upon (1) the performance of illegal acts, nor (2) upon remote possibilities, nor (3) upon contingencies which abridge the particular estate. Not upon illegal acts, because no one can be allowed to profit by his own wrong. Not upon remote possibilities, because the law does not favor the tying up of estates upon contingencies that will probably never occur. Not upon contingencies which abridge the particular estate, because these are breaches of condition subsequent and result in a return of the estate into the grantor, thereby defeating the remainder. The *particular estate necessary* to support a freehold contingent remainder must always be a freehold, otherwise there would be

no person to whom livery of seisin could be made by the grantor. But contingent estates less than freehold can be limited upon particular estates less than freehold, since the seisin always remains in the grantor as reversioner.

READ: 2 Bl. Com., pp. 169–172;
4 Kent Com., Lect. lix, pp. 206–214, 233–237, 248–262;
Washburn, Real Property, §§ 1555–1600;
Barbour, Rights of Persons and Property, pp. 528–531;
Walker, American Law, § 147;
Clark, Elementary Law, § 195;
Tiedeman, Real Property, §§ 401–424;
Pingrey, Real Property, §§ 1005–1010;
Rice, Real Property, §§ 45, 232–237;
Kirchwey, Readings on the Law of Real Property, pp. 333–346;
Boone, Real Property, §§ 173–179;
Tiffany, Real Property, §§ 123–129.

§ 100. Of Executory Estates.

The doctrine of remainders properly applies only to legal estates, but where equitable estates are created in the same manner they are governed as far as possible by the same rules. Thus where *future equitable estates* are created to take effect after preceding and supporting estates they are treated as true remainders. But where they are limited in such a manner, that they could not be remainders if they were legal estates, they can be sustained only by applying to them the principles expressed in the doctrine of uses and the Statute of Uses, which at the proper time executes the future use and transforms it into a legal estate. Such estates may occur in *five cases:* (1) Where an equitable estate is created to take effect in the future without the creation of any preceding estate; (2) Where a future equitable estate is limited to take effect upon a contingency which abridges the preceding particular estate; (3) Where a future equitable estate is limited to take effect at a greater or less interval after the preceding estate has determined; (4) Where an equitable estate in fee is limited to take effect after a preceding estate in fee; (5) Where an equitable estate for years is granted to one person for life or in fee with remainder over to another. Neither of these future estates can be a remainder, for the first has no particular estate; the second abridges the particular estate; the third is not supported by the particular estate; the fourth finds nothing to operate upon,

since the preceding fee exhausts the grantor's estate; while in the fifth the estate for years merges in the estate for life or in fee and nothing remains to vest in the remainderman. Such estates are therefore valid only as future uses to be executed by the Statute as they arise, until which time they remain executory, and hence are called *executory estates.* These estates may be created by will, and are then known as *executory devises;* or by conveyances to uses, when they are called *shifting or springing uses.*

Rem. An *executory devise* is a future equitable estate which is created by a will, and which cannot take effect as a remainder. Not being dependent on any preceding estate it cannot be defeated while a seisin exists to serve the use; and when it takes effect it will be executed by the Statute and become a legal estate unless the conditions which are attached to it by the will creating it determine otherwise. It may be limited either as a freehold or an estate for years and with or without preceding estates, but when a power of absolute disposition over the whole property has been conferred upon one devisee no further devise of it can be made. The seisin supporting an executory devise resides in the heirs of the testator if no other lodgment for it is provided by the will. *Conveyances to uses* are deeds or covenants from which four classes of uses may arise: (1) Contingent Uses; (2) Resulting Uses; (3) Shifting Uses; (4) Springing Uses. A *contingent use* is an equitable estate which is limited to take effect as a contingent remainder, and is governed by the same rules as other remainders. A *resulting use* is an equitable estate which, for some reason, cannot vest in the person in whose favor it was created, and hence remains in or returns to its grantor. A *shifting use* is an equitable estate conferred upon one person which, upon the happening of some future event, is to shift out of him into some other designated person. A *springing use* is an equitable estate which is to spring up as a new estate at some future time in some person other than the grantor. For these estates also a *seisin must be provided* somewhere to serve them, on failure of which these equitable estates will also fail. The contingencies on which future equitable estates shall arise may be fixed by the grantor at the time of their creation or may be subsequently determined by third persons as his agents acting under a *power of appointment,* — as when a man devises property to the use of his wife during her life, and after her death to such uses as she by her last will may appoint. The person to whom the power is entrusted is called the *donee* of the power; the person in whose favor it is exercised is called the *appointee.*

Where a power is given to the grantee of an equitable estate to create estates *out* of his own, it is known as a *power appendant or appurtenant;* where to create estates *after* his own, it is a *collateral* power; where the donee of a power is not also a grantee, he is said to have a *power in gross.* A *general power* authorizes the donee to appoint whomsoever he will, even himself; a *special power* designates the appointee. A *permissive power* enables the donee to appoint or not, at his pleasure; a *directory power* commands him to appoint, and can be enforced in equity. In exercising a power the donee must follow his instructions, and when the appointment has been made the appointee holds his estate from the original grantor, — the donor of the power. This doctrine of powers, in connection with that of remainders and executory estates, would enable owners of real property to control its sequestration and transmission for all future time were it not for certain restrictions which the courts have been obliged to impose upon it in the interest of free alienation, and which are embodied in two rules known as "The Rule in Shelley's Case" and "The Rule against Perpetuities."

READ: 2 Bl. Com., pp. 172–175, 334, 335;
4 Kent Com., Lect. lx, pp. 264–287; Lect. lxi, pp. 289–301; Lect. lxii, pp. 315–352;
Washburn, Real Property, §§ 1617–1784;
Barbour, Rights of Persons and Property, pp. 372–379, 531, 532;
Walker, American Law, § 148;
Clark, Elementary Law, § 197;
Tiedeman, Real Property, §§ 478–577;
Kerr, Real Property, §§ 1659–1872;
Pingrey, Real Property, §§ 1020–1047, 1102–1125;
Rice, Real Property, §§ 248, 249, 259–269;
Kirchwey, Readings on the Law of Real Property, pp. 346–350, 370–390;
Warvelle, Real Property, pp. 125–128, 359, 360;
Boone, Real Property, §§ 181–183, 189–201;
Tiffany, Real Property, §§ 134–160, 273–294.

§ 101. Of the Rule in Shelley's Case.

The *Rule in Shelley's Case* provides against the perpetuation of estates in families by the creation of a series of remainders to take effect in successive generations. The grant of an estate to A for life, with remainder to the right heir of A for life, with remainder to the right heir of the right heir of A for life, and so on, would result in a chain of life estates closely resembling a fee tail, and equally removing the property from alienation. To meet this evil the Rule in Shelley's Case prescribes that every

estate thus limited shall vest in the first taker as a fee simple with full power of alienation, and that if he retains it till his death his heirs shall receive it from him by inheritance also with full powers of alienation, and not as remaindermen under the original grant. The rule as formally stated is this: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs or the heirs of his body as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." The rule, therefore, does not apply to cases where the estate given to the first taker is less than a freehold, or where the successive estates are created by different grants, or where some of the estates are legal and others equitable, since the rule is intended, not to prevent the creation of distinct estates by separate grants, but the creation of one perpetual estate by a single grant. The effect of the rule cannot be avoided by interpolating other remainders between the estates limited to the first taker and his heirs, for the fee will still vest in the first taker and he can convey it to strangers or leave it to descend to his heirs, the inheritance opening at the designated time to let in these extraneous remainders and closing again when they have expired.

Rem. This rule receives its name because it was first elaborately discussed and explained in Shelley's case (1 Coke, 88), and was there stated as follows: "that when the ancestor, by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the '*heirs*' are words of limitation of the estate and not words of purchase." The substance of the rule, however, is much older than Shelley's case and has been recognized and enforced at least since A. D. 1325, or about a generation after the passage of the Statute *Quia Emptores*, by which the free alienation of lands granted in fee simple was first secured. No doubt the Rule in Shelley's Case often contradicts the intention of the grantor or testator and defeats his purpose, but it is still accepted in many of our States as part of their common law, while in others it has been repudiated by their courts, or repealed by statute.

READ: 2 Bl. Com., p. 242;
4 Kent Com., Lect. lix, pp. 214–233;
Washburn, Real Property, §§ 1601–1616;
Tiedeman, Real Property, §§ 433, 434;
Pingrey, Real Property, §§ 1011–1019;
Jones, Real Property, §§ 601–610;
Rice, Real Property, § 247;
Kirchwey, Readings on the Law of Real Property, pp. 350–357;
Warvelle, Real Property, pp. 267–271;
Boone, Real Property, §§ 180–180 *b*;
Tiffany, Real Property, §§ 130–133.

§ 102. Of the Rule against Perpetuities.

The *Rule against Perpetuities* provides against the postponement of the commencement of a future estate beyond a period measured by the lifetime of some person in being at the date of the grant, and twenty-one years and ten months afterwards. The object of the rule is to prevent the tying up of property to await the rise of remote estates, and compel its return into a legal condition where new estates in fee simple can be created in it. Any estate, therefore, which by the terms of the grant or devise is not certain to take effect within the period named is void. The duration of the period is so fixed as to enable grantors and testators to confer estates upon the unborn children of living persons, and have them take effect upon the arrival of such children at the age of twenty-one years, when for the first time they would be legally capable of conveying or devising them. The number of years which may actually intervene between the creation of the estate and the majority of the now unborn grantee or devisee does not enter into the contemplation of the rule, but may be few or many as the course of events determines.

Rem. The Rule against Perpetuities does not apply to public enterprises nor to charitable trusts, nor to the duration of estates already created. All existing estates are alienable in some form or to some person, and all conditions annexed to estates by which their alienation is entirely prohibited are void.

READ: 2 Bl. Com., pp. 173–175;
4 Kent Com., Lect. liv, p. 17; Lect. lx, pp. 264–272;
Washburn, Real Property, §§ 1785–1821, and note;
Andrews, American Law, § 825;
Rice, Real Property, §§ 270–276;
Kirchwey, Readings on the Law of Real Property, pp. 391–396,
Tiffany, Real Property, § 500.

Article VI

Of Joint and Several Estates in Real Property

§ 103. Of the Number and Connexion of the Tenants of Estates in Real Property.

A single estate in real property may belong to one person alone, or to several persons jointly as one tenant. Several concurrent estates may coexist in the same article of property, and each of these estates may be owned by one individual or a group of individuals. A number of distinct estates may also subsist in one article of property at the same time, and still the possession and enjoyment of the article may continue undivided in the collective owners of all these estates. With reference to this attribute of estates in real property they are distinguished into *six classes:* (1) Estates in Severalty; (2) Estates in Joint Tenancy; (3) Estates in Entirety; (4) Estates in Coparcenary; (5) Estates in Common; (6) Estates in Partnership.

Rem. These six classes by no means exhaust the possible combinations in which estates and their tenants could be arranged. Such combinations appear and disappear with the requirements of commerce and society. Two of these six are comparatively modern. Two are very old and are now falling into disuse. Others will be devised and recognized by law as the necessity for them arises.

Read: Tiedeman, Real Property, § 235;
Tiffany, Real Property, § 161.

§ 104. Of Estates in Severalty.

An *estate in severalty* is an estate all of whose rights of ownership and possession are vested in a single individual. This definition distinguishes estates in severalty from estates belonging to two or more owners, and from estates which, though separate in ownership from all other estates in the same property, are united with them in the right of possession. The owner of an estate in severalty has entire dominion over the estate, and if his right of possession is immediate also he has the exclusive enjoyment of the article of property.

Rem. Most estates in real property are estates in severalty, and all are presumed to be so unless the contrary is indicated by the terms of the grant or by implication of law.

READ: 2 Bl. Com., p. 179;
Barbour, Rights of Persons and Property, pp. 539, 540;
Walker, American Law, § 149;
Andrews, American Law, § 618;
Kerr, Real Property, §§ 1906–1908;
Warvelle, Real Property, p. 97;
Boone, Real Property, § 348.

§ 105. Of Estates in Joint Tenancy.

An *estate in joint tenancy* is an estate so created as to vest, both in ownership and in possession, in several persons as one tenant. It is characterized by *four unities*: (1) *Unity of Estate,* because there is but one estate and one tenant; (2) *Unity of Title,* because the one estate is created, in favor of all the persons who compose the one tenant, by the same grant; (3) *Unity of Time,* because the estate vests in all the persons, who compose the tenant, at the same instant; (4) *Unity of Possession,* because the same right of possession inheres concurrently in all the persons who compose the tenant. Out of the unity of estate grows the *right of survivorship,* because when one of the persons, who hold the estate as one tenant, drops out of the group by death or otherwise, the one tenant and the one estate remain in the survivors, and when all but one have disappeared reside in him as sole survivor. As a consequence also of these unities the *enjoyment* of the property by one of the joint tenants is the enjoyment of all; any act of one benefiting the property enures to the advantage of all; none of them can sue or be sued alone in respect to the joint property; and neither can convey the property without the concurrence of all. As a consequence of the right of survivorship the estate is not subject to dower or curtesy, nor can it be devised, until it has become an estate in severalty. Freehold joint tenants are said to be *seised per my et per tout,* — that is, by the share and by the whole, because each has the seisin both of his undivided share and of the whole estate.

Rem. An estate in joint tenancy, like so many other estates which originated and flourished in the earlier periods of our law, was devised for the purpose of tying up property in families, securing its ultimate enjoyment to persons more or less remote, and preventing its alienation in fee simple for long periods of

time. As such it eventually incurred the law's disfavor and was gradually changed in many of its attributes, until by recognizing the right of each person in the tenancy to separate his share from the rest and convey it to a stranger, and the right of all the persons by common consent to divide the property among themselves, the law permitted the unity of the estate and the right of survivorship to be defeated by the owners at their pleasure. Shorn of these qualities this estate lost much of its importance, and though it can still be created it requires express and unequivocal language in the grant or will; and when created it can be destroyed and changed into an estate in severalty, or an estate in common, at any time by the act of the grantees. As long as they permit it to continue as a joint estate, however, it will follow the course established by the ancient rule.

READ: 2 Bl. Com., pp. 180–187;
4 Kent Com., Lect. lxiv, pp. 357–366;
Washburn, Real Property, §§ 851–869;
Barbour, Rights of Persons and Property, pp. 540–545;
Walker, American Law, § 149;
Andrews, American Law, § 618;
Clark, Elementary Law, § 201;
Tiedeman, Real Property, §§ 236–238;
Kerr, Real Property, §§ 1909–1945;
Pingrey, Real Property, §§ 660–669;
Jones, Real Property, §§ 1770–1789;
Rice, Real Property, §§ 418–422;
Kirchwey, Readings on the Law of Real Property, pp. 179–185;
Warvelle, Real Property, pp. 97–99;
Boone, Real Property, §§ 349–355;
Tiffany, Real Property, § 162.

§ 106. Of Estates in Entirety.

An *estate in entirety* is an estate granted to a husband and wife to hold jointly. In many respects it resembles an estate in joint tenancy, but differs from it in this, — that as the husband and wife are one person in law, and consequently cannot be contemplated as owning separate shares, the seisin is *per tout and not per my*, by the whole and not by the share. During their joint lives, however, the estate is one and indivisible except by the act of both, and unless aliened or devised by mutual consent vests in the survivor at the death of the other party. If under the local laws the husband has the control of the wife's realty during coverture, the estate in entirety resides in him and he may use or alien or lease it for his own lifetime, or his life estate in it can be taken on execution by his creditors.

Rem. In several of our American States an estate by entirety is unknown, and any joint estate in a husband and wife is regarded as an estate in common. In other States, while this estate is recognized, its details are regulated by local statutes.

READ: 4 Kent Com., Lect. lxiv, pp. 362, 363;
Washburn, Real Property, §§ 520–539, and note, 911–916;
Clark, Elementary Law, § 201;
Tiedeman, Real Property, §§ 242–244;
Kerr, Real Property, §§ 1968–1991;
Pingrey, Real Property, §§ 701–706;
Jones, Real Property, §§ 1790–1817;
Rice, Real Property, §§ 435–445;
Kirchwey, Readings on the Law of Real Property, pp. 196–198;
Warvelle, Real Property, pp. 99–102;
Boone, Real Property, § 366;
Tiffany, Real Property, §§ 165, 166.

§ 107. Of Estates in Coparcenary.

An *estate in coparcenary* is an estate in fee which, at the death of its former owner, has descended to two or more persons as his heirs at law. In some particulars this estate resembles a joint tenancy, and in others an estate in common. The estate, as it descends, is one estate, and all the heirs taken together receive it as one tenant. Hence they are said to be seised *per my et per tout;* and yet each is the owner of the whole of a distinct share which he can alien or devise, and which at his death will descend to his heirs. There is no *right of survivorship,* and the parties may at any time divide the property among themselves, or either of them may procure its partition by the courts.

Rem. This estate was a very important one under the English law, and usually arose whenever an estate descended to female heirs, or in cases where the rule of primogeniture could not be applied. In this country it exists in several of our States; in others, groups of heirs take by descent as tenants in common.

READ: 2 Bl. Com., pp. 187–191;
4 Kent Com., Lect. lxiv, pp. 366, 367;
Washburn, Real Property, §§ 870–875;
Tiedeman, Real Property, § 241;
Kerr, Real Property, §§ 1964–1967;
Pingrey, Real Property, §§ 670, 671;
Rice, Real Property, § 423;
Kirchwey, Readings on the Law of Real Property, pp. 192–195;

Warvelle, Real Property, pp. 104, 105;
Boone, Real Property, § 356;
Tiffany, Real Property, § 164.

§ 108. Of Estates in Common.

An *estate in common* is an estate in an undivided share of some article of property, the possession of which resides in its owner in common with the owners of the estates in the other undivided shares. Any number of such estates may coexist in any article of property, and the shares may be equal or unequal; but each share vests in its owner separately from every other share, and may be conveyed by him without reference to the other shares. In making such conveyance, however, he must describe his estate as an *undivided share* of the whole property and not as a specific part of it, since as long as the possession remains in common none of the owners has an exclusive right to any particular portion of the property. The *seisin* of freehold tenants in common is said to be *per my* and not *per tout*, — by the share and not by the whole, — and while this continues neither of them can do any act which prejudices the seisin or estates of his co-tenants. Estates in common may be *created* by grant or devise or descent, or by the destruction of any of the unities of estates in joint tenancy, entirety, or coparcenary, except the unity of possession. Of contemporaneous estates in common some may have arisen by deed, others by inheritance, others by will, and at as many different dates as there are different estates.

Rem. Estates in common are the most simple and flexible of all joint estates, and on that account are more favored in the law than any others. Whenever it is doubtful to which class of cotenancies an estate belongs the courts construe it to be an estate in common.

READ: 2 Bl. Com., pp. 191–194;
4 Kent Com., Lect. lxiv, pp. 367–369;
Washburn, Real Property, §§ 876–881;
Barbour, Rights of Persons and Property, pp. 545–549;
Walker, American Law, § 150;
Andrews, American Law, § 618;
Clark, Elementary Law, § 201;
Tiedeman, Real Property, §§ 239, 240;
Kerr, Real Property, §§ 1946–1963;

Pingrey, Real Property, §§ 672–700;
Jones, Real Property, §§ 1818–1825;
Rice, Real Property, §§ 406–414;
Kirchwey, Readings on the Law of Real Property, pp. 186–191;
Warvelle, Real Property, pp. 102, 103;
Boone, Real Property, §§ 357–363;
Tiffany, Real Property, § 163.

§ 109. Of Estates in Partnership.

An *estate in partnership* is an estate purchased by a partnership with partnership funds, and held for partnership purposes. This estate has a *dual aspect.* As between its owners it is an estate in joint tenancy or in common, as the grant may determine. But as between the partnership and its creditors it is a fund for the payment of debts, and is treated in equity as money and not as land. Until these debts are paid the property cannot be taken by creditors of the owners as individuals, nor descend to their heirs, nor be subject to dower or curtesy. On the death of either of the partners it survives to the others, and remains in them till the partnership obligations are satisfied. Then it resumes the usual course of other joint estates. An estate may be an estate in partnership, though the property were *purchased* by one of the partners in his own name, provided that the circumstances and intention of the purchase make it, in law, an asset of the partnership. In that case it resides in the nominal purchaser as *trustee for the firm,* and also for its creditors so far as the satisfaction of their claims requires.

Rem. Estates do not become estates in partnership from the mere fact that they are owned by two or more partners, or that they were paid for out of partnership funds; for this may be their method of dividing and investing the profits of their business, and will then make them tenants in common or joint tenants only. It is when the estate is *acquired for partnership purposes,* as a part of the assets of the business in which the partnership is engaged, and becomes the basis of partnership credit, that this peculiar character attaches to it which distinguishes it from other classes of joint estates.

READ: Washburn, Real Property, §§ 897–906;
Andrews, American Law, § 618;
Tiedeman, Real Property, §§ 245, 246;
Kerr, Real Property, §§ 1992–1999;
Pingrey, Real Property, §§ 707–713;

Jones, Real Property, §§ 1826–1834;
Rice, Real Property, §§ 415, 416;
Warvelle, Real Property, pp. 103, 104;
Boone, Real Property, § 364;
Tiffany, Real Property, § 167.

§ 110. Of the Reciprocal Rights and Duties of Co-tenants.

All joint estates include at least one unity, — the *unity of possession;* and therefore the possession of one owner is the possession of all, and never can become adverse to the others until by some open act or declaration the actual possessor repudiates the title of the rest. Where all or several *occupy the property,* each is in possession of the whole unless they make some different arrangement by agreement among themselves. Those who occupy the property are entitled to use it for their personal benefit without accountability to the others, but if they underlet it or sell its products and receive a profit the others have a right to their proportionate share. A duty rests upon all co-tenants to keep the common property in *suitable repair,* and equity will enforce this duty at the request of any of the owners, but none can be compelled to contribute to *improvements* which he has not authorized, even though he should participate in their enjoyment. In *suits regarding the possession* all the co-tenants must be joined either as plaintiffs or defendants.

Rem. Reciprocal rights of co-tenants do not extend beyond the unities which characterize their joint estate. Thus where the estates are several and the possession is joint, as in estates in common, each of the tenants is, in reference to all rights of *ownership,* an independent individual, and must sue or be sued alone, and stands unaffected by any acts or defaults of the others. But where the ownership of the estate is joint, as in a true joint tenancy and others which resemble it, they must act jointly in asserting or defending their rights, and any conduct of one which fortifies the title to the estate, as by the purchase of adverse claims or the extinguishment of incumbrances, operates to the advantage of all if they elect to pay their share of the expense.

READ: 4 Kent Com., Lect. lxiv, pp. 368–371;
Washburn, Real Property, §§ 882–896;
Tiedeman, Real Property, §§ 251–255;
Kerr, Real Property, §§ 2000–2007;
Jones, Real Property, §§ 1835–1938;
Tiffany, Real Property, §§ 168–173.

§ 111. Of the Partition of Joint Estates.

Joint estates may be divided: (1) By the voluntary act of all the owners; (2) By suit at law; (3) By proceedings in equity; (4) By order of a court of probate. A *voluntary partition* may be made by mutual deeds of release, and in some cases by a verbal agreement followed by actual occupation of the divided shares. Any owner having an immediate right of seisin or possession may *sue the others in a court of law* for the division of the property, and if his title is found to be impregnable, and the property is apartible, the court will order its division among the several owners in proportion to their respective shares. Where the property is not apartible recourse may be had to a *court of equity*, which, on finding that the right to a division exists, can make it either by selling the property and distributing the proceeds, or by apportioning its income or its practical use, or by any other method which will secure the interests of all the owners. *Partition in probate courts* takes place in connection with the settlement of decedents' estates, and awards their proper shares of the property to the heirs or distributees, unless a will otherwise provides. Where the property is itself divided by legal proceedings any co-owner, who may have improved any portion of the common property, will receive that portion as his share, if no prejudice is thereby done to the others; but he has no claim thereto against their interests. A partition by the courts, once made, can be revised and corrected should it subsequently appear that the title to any portion of the divided property was invalid, or that distribution had been made to some one who had no right to a share. A partition by mutual agreement, in the absence of fraud, is final.

Rem. Under the earlier law no joint estates, except the estate in coparcenary, could be divided, but all must be held according to the terms of their creation. In A. D. 1540–41, however, authority was given to the courts of common law to make partitions, and soon after that time equity began to act upon those cases which were beyond the sphere of the courts of law. In our own States at present the subject is governed, to a considerable extent, by local statutes. The partition of a joint estate creates no new estates, but merely gives the old estates or interests a definite boundary; nor does it affect claims upon the property as a whole, such as those of mortgagees or the owners of incorporeal hereditaments therein.

READ: 2 Bl. Com., p. 194;
4 Kent Com., Lect. lxiv, pp. 364–366, 369;
Washburn, Real Property, §§ 917–934;
Tiedeman, Real Property, §§ 259–265;
Kerr, Real Property, §§ 2008–2029;
Pingrey, Real Property, §§ 714–735;
Jones, Real Property, §§ 1939–2000;
Rice, Real Property, § 417;
Warvelle, Real Property, pp. 105, 106;
Boone, Real Property, §§ 367–371 *a*, 535–561;
Tiffany, Real Property, §§ 174, 175.

ARTICLE VII

OF THE TITLE TO ESTATES IN REAL PROPERTY

§ 112. Of Title.

Title is the means whereby an estate is acquired; that is, the mode of its original creation, or of its transfer from one person to another. Title to estates in real property is governed by the *lex rei sitæ*, or law of the State where the property is situated, and all questions as to the validity and effect of the modes adopted for its creation and transfer are determined by that law. Title is of *two classes:* (1) Title by Descent; and (2) Title by Purchase. *Title by descent* is the means by which the heir at law acquires the estate upon the death of the ancestor. *Title by purchase* includes every other form by which estates can be created or transferred.

Rem. Title by descent arises by operation of law, and simply transmits an existing estate of inheritance with all its incidental rights and obligations to a person whom the law designates as the heir. Title by purchase arises either by operation of law, or by the act of the present owner, or by the concurrent act of the present and a former owner; and may create a new estate, or transfer an old estate with or without its prior incidents. In estates of inheritance a purchaser becomes the new stock from which the descent of future heirs is traced until superseded by another purchaser.

READ: 2 Bl. Com., pp. 195–201;
4 Kent Com., Lect. lxv, pp. 373, 374;
Washburn, Real Property, §§ 1822–1824;
Barbour, Rights of Persons and Property, pp. 552, 553;
Andrews, American Law, § 619.
Clark, Elementary Law, § 204;

Tiedeman, Real Property, §§ 659–664;
Kerr, Real Property, §§ 2254–2256;
Rice, Real Property, § 30;
Kirchwey, Readings on the Law of Real Property, pp. 412–415;
Warvelle, Real Property, pp. 130, 131, 141, 142;
Boone, Real Property, §§ 246, 247.

§ 113. Of Title by Descent.

The primary test by which the law designates the person to whom an estate shall descend is his consanguinity, or blood relationship to the deceased owner. *Consanguinity* is the tie which unites persons who are descended from the same stock, or common ancestor. It is of two kinds: (1) Lineal; and (2) Collateral. *Lineal consanguinity* is the relationship between persons one of whom is descended in a direct line from the other. *Collateral consanguinity* is the relationship of persons who are descended from the same stock, but not one from the other. *Degrees of lineal consanguinity* are reckoned by counting the generations from the ancestor to the heir. *Degrees of collateral consanguinity* are computed either by counting downward from the common ancestor to the most remote of the compared descendants, or by counting upward from one of them to the common ancestor and then downward to the other. By the first method cousins are related in the second degree; by the latter method, in the fourth degree. A further distinction is made between kindred of the whole blood and kindred of the half blood. *Kindred of the whole blood* are descended from the common ancestor by the same wife or husband. *Kindred of the half blood* are descended from the same common ancestor, but by different marriages. The feudal rules of descent, based on this doctrine of consanguinity, formed an elaborate and symmetrical body of law which has long since given way, on both sides of the Atlantic, to methods better suited to modern conditions of family and social life. In this country the whole subject is mostly regulated by local statutes which, in our different States, are widely variant from one another.

Rem. Notwithstanding the variations in our local laws of inheritance they possess certain *common principles*, such as (1) That issue of the first generation are to be preferred to other kindred; (2) That issue of deceased heirs represent their parents;

(3) That where lineal descendants fail, or are more remote than a certain degree, lineal ascendants may inherit; (4) That males and females of the same degree inherit equally as coparceners or as tenants in common; (5) That husbands and wives may, in some cases, inherit from one another; (6) That collateral heirs may take in the absence of lineal heirs; (7) That kindred of the half blood may inherit equally with or in default of kindred of the whole blood. Complete uniformity in all other details of the law of descent, though greatly to be desired, can scarcely be expected in view of the force of long-imbedded customs and local traditions.

READ: 2 Bl. Com., pp. 202–207, 227;
4 Kent Com., Lect. lxv, pp. 374–419;
Washburn, Real Property, §§ 1825–1865, and note;
Barbour, Rights of Persons and Property, pp. 331–334;
Walker, American Law, §§ 187–193;
Clark, Elementary Law, § 205;
Tiedeman, Real Property, §§ 665–675;
Kerr, Real Property, §§ 391–418, 2257–2269;
Pingrey, Real Property, §§ 1126–1157;
Rice, Real Property, §§ 325–332;
Kirchwey, Readings on the Law of Real Property, pp. 447–456;
Warvelle, Real Property, pp. 142–158;
Boone, Real Property, §§ 262–275;
Tiffany, Real Property, §§ 425–435.

§ 114. Of Title by Purchase.

Title by purchase is of *fourteen species*: (1) Title by Escheat; (2) Title by Accretion; (3) Title by Abandonment; (4) Title by Forfeiture; (5) Title by Prescription; (6) Title by Adverse Possession; (7) Title by Marriage; (8) Title by Execution; (9) Title by Judicial Decree; (10) Title by Eminent Domain; (11) Title by Prior Occupation; (12) Title by Estoppel; (13) Title by Grant; (14) Title by Devise. Of these the titles by escheat and accretion arise by operation of the law alone upon the occurrence of certain events, without requiring any act of either the present or the former owner of the property. The titles by abandonment, forfeiture, prescription, adverse possession, marriage, execution, judicial decree, eminent domain, prior occupation, and estoppel originate in the operation of the law upon the actions or omissions either of the former or the present owner of the property. The titles by grant and devise are created by the concurrent action of both the present and the former owners of the property.

Rem. The legal character of a species of title cannot always be accurately determined from the name it bears, or the form it may assume; its purpose and effect must also be considered. Thus a devise, to an heir at law, of the same property which he would otherwise inherit does not vest the property in him by title by *devise;* on the contrary, he receives it by title by *descent,* according to the legal effect of the transaction.

READ: Washburn, Real Property, §§ 1824, 1856;
Clark, Elementary Law, § 206;
Warvelle, Real Property, pp. 158–160.

§ 115. Of Title by Escheat.

Title by escheat is the title by which the State acquires an estate in fee simple upon the death of its former owner intestate and without heirs. Theoretically, all estates in real property were originally derived from the State of whose territory that property forms a part; and therefore, on failure of private ownership, the property returns into the common ownership of the State. Before the State takes actual possession, however, there is usually a formal inquiry as to the failure of heirs called "*inquest of office*" or "*office found.*" Property vesting in the State by this title is subject to all the easements, mortgages, and other incumbrances which attached to it in the hands of the former owner.

Rem. The doctrine of escheat had its origin in the feudal law and recognized the right of the sovereign, as the ultimate lord of the fee, to the reversion of all estates which failed for want of owners, or were forfeited for treason or other crimes against the State. Naturally, the same principle is applied in this country, where no feudal relation exists, for it is equally repugnant to our law that property should be without an owner, or that on an entire failure of title it should enure to the benefit of individuals as against the general public. Property acquired by the State by this title may be granted to private persons, or applied to charitable purposes.

READ: 2 Bl. Com., pp. 244–257;
4 Kent Com., Lect. lxiv, pp. 423–426;
Washburn, Real Property, §§ 1866–1874;
Barbour, Rights of Persons and Property, pp. 559, 560;
Andrews, American Law, §§ 584–593;
Clark, Elementary Law, § 207;
Pingrey, Real Property, § 1265;

Rice, Real Property, § 367;
Kirchwey, Readings on the Law of Real Property, pp. 366–369, 470–474;
Warvelle, Real Property, pp. 183–186;
Boone, Real Property, § 255;
Tiffany, Real Property, § 458.

§ 116. Of Title by Accretion.

Title by accretion is the title by which the owner of land acquires an estate in other land, which has been added thereto by the operation of natural causes. Where the operation of these causes is so *gradual* that only the results and not the actual process can be perceived, the added matter is called *alluvion,* and belongs to the owner of the land on which it is deposited. Where the operation is *sudden* and extensive, so that the process and result can both be discerned, it is called *avulsion* and still belongs to its original owner, unless abandoned by him to the owner of the land on which it has been thrown. Changes produced by *artificial causes* do not give rise to title by accretion, and except by contract between the parties, or by estoppel, do not affect their former rights of property.

Rem. Most of the instances, in which property is acquired by title by accretion, occur from the action of *water,* either washing away or adding to the shores, or submerging or elevating and leaving bare the beds of streams and seas, or altering the course of rivers and their boundaries. What effect this action has on ownership depends in part on the existing titles, and in part on the mode in which the changes take place. In public waters, where the bed is owned by the State, such alluvion as accumulates in direct contact with the shores belongs to the riparian proprietors, and is divided between them by allotting to each the same proportion of the new coast line that he had of the old, and then producing the lateral boundaries of his land until they meet the termini of his new boundary upon the shore. Islands forming in public waters, and separated from the shore by a channel, belong to the State. In private waters alluvion forming on the shores, or islands arising from the bed, follow the ownership of bed or shore according to the original boundary, unless the boundary is the *filum aquæ,* — in which case as the thread of the stream gradually varies the boundary varies with it. A sudden and considerable alteration in the course of a stream does not change the boundary, but each proprietor maintains his former area, though the whole stream may be now embraced in the land of one or the other.

Wreckage carried by a freshet and deposited on lower land may be reclaimed by its owner, or ejected by the owner of the lower land; but the latter acquires no title to it unless its owner neglects to remove it within a reasonable time.

READ: 2 Bl. Com., pp. 261, 262;
3 Kent Com., Lect. lii, p. 428;
Washburn, Real Property, §§ 1880–1887;
Clark, Elementary Law, § 208;
Tiedeman, Real Property, §§ 685–687;
Kerr, Real Property, § 2272;
Pingrey, Real Property, §§ 11–13;
Rice, Real Property, § 367;
Warvelle, Real Property, pp. 175–179;
Boone, Real Property, §§ 254–254 *a*;
Tiffany, Real Property, §§ 453–455.

§ 117. Of Title by Abandonment.

Title by abandonment is the title whereby the owner of an estate which is subject to an incorporeal hereditament acquires the right, without his own act, to hold his estate free from the burden of such incorporeal hereditament. This title can arise only when the owner of the hereditament does some voluntary and *unequivocal act* which manifests his permanent intention to relinquish his right to the hereditament; as where he erects a solid building on his own land which cuts off his access to his right of way across the servient land; or where he moves a dam to a point higher up the stream, and thus renders it impossible to avail himself of his former right of flowage. Mere *non-user*, however, does not destroy a vested incorporeal hereditament, though if long continued, and accompanied by acts of exclusion on the part of the owner of the servient estate, it may operate by estoppel to defeat the right.

Rem. A distinction is sometimes taken between incorporeal hereditaments acquired by express or implied grant, and those acquired by prescription or presumed grant, in reference to the effect of non-user as an abandonment. While it is held that those acquired by express or implied grant cannot be lost by mere non-user, because the record owner is at liberty to enjoy his right or not as he pleases, it is maintained that one whose right rests wholly upon the presumption arising from long-continued use may by non-user rebut those presumptions, and thus extinguish the apparent title which his possession has conferred upon him.

READ: 3 Kent Com., Lect. lii, pp. 448–451;
Washburn, Real Property, §§ 1273–1276, 1312–1315, 1888, 1959;
Clark, Elementary Law, § 209;
Tiedeman, Real Property, §§ 739, 740;
Kerr, Real Property, § 2276.

§ 118. Of Title by Forfeiture.

Title by forfeiture is the title by which one person acquires a new estate, or the enlargement of an existing estate, or the acceleration of a future estate, in consequence of the wrongful action or omission of another person who has thereby lost his own different estate. To perfect this title the person in whose favor it is to operate must *enter* on the property and assert his right, unless relieved from that formal duty by contract or local law. A common example of this title occurs where a tenant for years forfeits his estate by the breach of some condition, and the landlord thereupon ejects him and reoccupies the land, — thus anticipating the time when his reversion would naturally accrue.

Rem. The causes of forfeiture under the English law were numerous, of which the principal were (1) *Heinous crimes*, such as treason, and the like; (2) *Alienation by particular tenants* in derogation of the rights of the remainderman or reversioner; (3) *Disclaimer by a tenant* of the title of his landlord; (4) *Waste by a tenant.* Forfeitures of real property for crime are in this country comparatively unknown. Forfeiture for alienation by particular tenants has been practically superseded by the rule that such alienations are ineffective beyond the interest which the tenant has a right to convey. Forfeitures for disclaimer of title and for waste, as well as for breach of conditions subsequent, though not favored by our courts, are still recognized by our law.

READ: 2 Bl. Com., pp. 267–286;
4 Kent Com., Lect. lv, pp. 80–84; Lect. lvi, p. 106; Lect. lxvi, pp. 426–428;
Washburn, Real Property, §§ 229–233, 659–666, 684, 960–965;
Barbour, Rights of Persons and Property, pp. 573–575;
Clark, Elementary Law, § 210;
Tiedeman, Real Property, §§ 197–200;
Pingrey, Real Property, § 1266;
Kirchwey, Readings on the Law of Real Property, pp. 475–485;
Warvelle, Real Property, pp. 186, 187;
Tiffany, Real Property, §§ 52, 459.

§ 119. Of Title by Prescription.

Title by prescription is the title by which a person who enjoys the use of an incorporeal hereditament under certain circumstances, and for a certain period, acquires an estate in that hereditament which is commensurate with his accustomed use. The *period of the use* is fixed by local laws, particularly by the Statute of Limitations. The *circumstances of the use* are these: (1) *Adverse,* — that is, inconsistent with the full enjoyment of the servient property by its true owner, according to the nature of his estate therein; (2) *Under a claim of right,* — that is, with the avowal by words or unequivocal conduct, on the part of the user, that he has a legal right so to use the hereditament; (3) *Continuous,* — that is, without abandonment or disuse, or substantial alteration in the mode or extent of his use, of the hereditament; (4) *Uninterrupted,* — that is, used during the whole of the required period of time by the same person, or by a series of persons each of whom claims to have derived his title through his predecessors in the use from the original adverse user; (5) *Peaceable,* — that is, without such interference from the owner of the servient property as suspended, or restricted, or terminated, or in any hostile manner obstructed the use; (6) *With the knowledge of the owner of the servient property,* — that is, with actual information upon his part, from the beginning of the use, that it not only existed but was intended by the user as the assertion of a legal right.

Rem. Title by prescription is identical with title by presumed grant, and applies only to incorporeal hereditaments. Incorporeal hereditaments always arise out of a *grant* by the owner of the servient property; and this grant may be in express words, or may be implied from the express grant of an object to which the incorporeal hereditament necessarily attaches, or may be presumed by the law from circumstances which cannot be explained except upon the supposition that an express grant has been made and cannot now be found. Thus where the owner of the servient estate knowingly and peaceably acquiesces in the adverse, continuous, and uninterrupted use of an incorporeal hereditament in his property by another person, under a claim of right, until the law deprives him of a legal remedy to prevent it, his conduct is inexplicable except upon the theory that he had no power to prevent it, because the claim of right was founded on a valid grant which could not be disputed although the docu-

ment containing it has since been lost. Such a use also has all the ear-marks of *true ownership*, and contains nothing and omits nothing which the grant of the hereditament by an express grant would not omit or contain. Hence title by prescription, once perfected by lapse of time, is as impregnable as a title by original grant, although the claimant is always subject to be put upon its proof by any owner of the servient property. Title by prescription is sometimes identified with *title by estoppel*, but the identity is not complete. There is an appearance of estoppel in title by prescription, in so far as the owner of the servient estate, who has acquiesced in the use of the hereditament until his remedy is barred by law, is now forbidden to assert it, but this is quite a different matter from the legal presumption of an original express grant. Moreover, the right to an incorporeal hereditament may arise by estoppel from the acts or omissions of the owner of the servient estate, without reference to the lapse of time and several other necessary attributes of the user which alone can ripen into title by prescription. These two titles spring from different sources, and rest on entirely different principles, and though they may sometimes apply to the same state of facts nothing can be gained by confounding them with one another.

READ: 2 Bl. Com., pp. 263–266;
3 Kent Com., Lect. lii, pp. 441–445;
Washburn, Real Property, §§ 1249–1263, 1877–1879;
Barbour, Rights of Persons and Property, pp. 575–578;
Clark, Elementary Law, § 211;
Kerr, Real Property, § 2271;
Kirchwey, Readings on the Law of Real Property, pp. 495–501;
Warvelle, Real Property, pp. 193–195;
Boone, Real Property, §§ 248–251;
Tiffany, Real Property, §§ 445–452.

§ 120. Of Title by Adverse Possession.

Title by adverse possession is the title by which the possessor of land, after a certain period of exclusive possession, acquires by virtue of such possession a fee simple estate therein. To have this effect his possession must be (1) *Actual*, — that is, a physical occupation of the land, either by the adverse possessor himself or by some other person claiming title under him; (2) *Definite*, — that is, limited to a specific area, with such perceptible boundaries that the precise extent of the physical occupation is always ascertainable; (3) *Notorious*, — that is, so open and apparent that no one familiar with the land, as the real owner is presumed to be, could fail to be aware of the

adverse possession; (4) *Hostile,* — that is, inconsistent with the assertible seisin of the land by its true owner in fee simple; (5) *Continued,* — that is, without abandonment of the land by the adverse possessor, and without entry on the land by its true owner; (6) *Exclusive,* — that is, undisturbed by the antagonistic occupation of other adverse claimants of the land; (7) *Uninterrupted,* — that is, possessed during the whole of the required period by the same adverse possessor, or by a series of adverse possessors each claiming title through his predecessors from the original adverse possessor; (8) *Under a claim of right,* — that is, with the open assertion by the adverse possessor, in unequivocal words or acts, that he holds possession of the land as its lawful owner in fee simple. When an adverse possession, having these eight attributes, has been maintained until the true owner of the land has been deprived, by the Statute of Limitations, of his right of entry to regain possession, the adverse possessor can maintain his possession against all the world, and is henceforth recognized by the law as the owner in fee simple. The estate which he acquires, however, is not derived from nor based upon the estate of the former owner of the land, but is a *new and independent estate* arising by operation of law upon his own adverse possession, and the neglect of the former owner to assert his rights within the time allowed him for that purpose.

Rem. Title by adverse possession differs from title by prescription in three particulars: (1) It relates to land only, and not to incorporeal hereditaments; (2) It does not rest on a presumed grant from the real owner of the land, but openly repudiates his title and insists on independent ownership in the adverse possessor; (3) It does not result in a right limited to the mode of the possession, but in an unlimited and absolute dominion over the entire property possessed. There is, therefore, nothing in common between these two titles, except that both arise out of long continued possessions some of whose attributes are similar to each other, and they should never be confused with one another. Title by adverse possession is also distinct from *title by estoppel,* inasmuch as it requires the positive bar of the Statute of Limitations to give it effect, while estoppel may arise from circumstances alone and without reference to lapse of time. Moreover, it has no resemblance to *title by an actual grant,* the instrument containing which is now lost or destroyed, but whose former existence is allowed to be proved by a long possession

bearing all the marks of rightful ownership. It is, indeed, sometimes stated that title by adverse possession is aided by legal presumptions arising from the possession of the claimant and the acquiescence of the real owner of the land, but this language is not consistent with the present interpretation of the Statute of Limitations, which regards it not as a statute of presumptions but as a statute of repose. Land acquired by adverse possession is free from all the burdens and limitations which attach to prior estates in the property, but the title not being evidenced by deed or record the ownership must be proved, whenever disputed, by showing the adverse possession by which it was obtained.

READ: 2 Bl. Com., pp. 195–199;
Washburn, Real Property, §§ 1944–1994;
Barbour, Rights of Persons and Property, pp. 553–556;
Walker, American Law, §§ 177, 178;
Clark, Elementary Law, § 212;
Tiedeman, Real Property, §§ 692–704, 713–717;
Kerr, Real Property, §§ 2273, 2274;
Pingrey, Real Property, §§ 1158–1200;
Rice, Real Property, §§ 333–345;
Warvelle, Real Property, pp. 195–199;
Boone, Real Property, §§ 252–255 *c*;
Tiffany, Real Property, §§ 436–444;
Bolles, Important English Statutes, p. 45, *Statute of Limitations, Henry VIII;* p. 83, *Statute of Limitations, 21 James I.*

§ 121. Of Title by Marriage.

Title by marriage is the title by which a husband acquires an estate in the real property of his wife, or a wife acquires an estate in the real property of her husband, as incidental to the marriage relation. These estates arise by operation of law either immediately upon the marriage, or upon the occurrence of certain subsequent events. The principal estates thus created are curtesy and dower.

Rem. Until recently the common law of England and the United States conferred upon a husband, at the time of his marriage, all estates less than freehold belonging to the wife and the rents and profits of her freehold estates, together with their actual control during the coverture, and a prospective estate by curtesy if the requisite conditions should be fulfilled. At the same time the wife acquired a prospective right of dower in her husband's estates in fee. These rights have been modified in various ways by the local statutes of our States during the past two generations, and only by consulting them can the present scope of title by marriage be fully ascertained.

READ: 2 Kent Com., Lect. xxviii, pp. 130–134;
Washburn, Real Property, §§ 520–539;
Clark, Elementary Law, § 213;
Tiedeman, Real Property, §§ 90–94;
Kerr, Real Property, §§ 1475–1498;
Kirchwey, Readings on the Law of Real Property, pp. 486–491;
Tiffany, Real Property, §§ 176–178.

§ 122. Of Title by Execution.

Title by execution is the title by which a judgment creditor, or some other person, acquires an estate in such real property of the judgment debtor as may be sold or set off by legal process in satisfaction of the judgment debt. In all our States real property as well as personal can be seized and applied by the law to the payment of the owner's obligations. When suit is brought upon such obligations by the creditor, and he obtains a judgment against the debtor, the obligation sued upon is *merged in the judgment*, and the judgment is enforced by levying an execution upon the property of the debtor. The *mode of levying an execution* on real property differs in different States. In some, so much of the property as may be necessary to satisfy the claim is conveyed directly by the sheriff to the creditor. In others, the land is sold at auction, the judgment satisfied out of the proceeds, and the balance delivered to the debtor. In others, a portion of the land may be set out to the creditor to hold until its rents and profits pay the debt. Title by execution also includes the methods by which the *taxes and assessments* due the State are collected out of the property of the subject. Estates acquired by execution are liable to all incumbrances and conditions attached to the land in the hands of the debtor, unless exempted by special statutes.

Rem. Prior to A. D. 1732, although lands could be set out on execution to a judgment creditor to hold until the rents and profits paid the debt, the land itself could not be permanently taken from the debtor and its ownership transferred to another. By Act of Parliament, in A. D. 1732, lands in the American colonies were authorized to be sold on execution for the judgment debts of their owners, and such has ever since been the law of this country. In many of our States a *judgment lien* attaches to the lands of the debtor at the date of the judgment, and may be foreclosed like a mortgage.

READ: 3 Bl. Com., pp. 418, 419;
4 Kent Com., Lect. lxvi, pp. 428–439;
Washburn, Real Property, §§ 2045, 2046, 2060–2076;
Barbour, Rights of Persons and Property, pp. 568, 569;
Clark, Elementary Law, §§ 214, 215, 218;
Tiedeman, Real Property, §§ 757, 759–761;
Kerr, Real Property, §§ 2303, 2304;
Pingrey, Real Property, §§ 1271, 1275;
Rice, Real Property, §§ 41, 42, 363–367;
Kirchwey, Readings on the Law of Real Property, pp. 529–531;
Warvelle, Real Property, pp. 187–189, 329–335, 408–413;
Boone, Real Property, §§ 260, 261;
Tiffany, Real Property, §§ 460, 467–470.

§ 123. Of Title by Judicial Decree.

Title by judicial decree is the title by which a person acquires an estate in real property by virtue of the judicial action of a court which, of its own authority and without the concurrent acts of either of the parties, directly creates the estate in his favor or transfers it to him from the former owner. Examples of this title occur in proceedings in *involuntary bankruptcy*, where the real property of the bankrupt is, by the decree of bankruptcy, vested in the assignee; and in cases where a court of *equity decrees* that the title to real property shall henceforth reside in a definite person, without requiring the present owner to execute to him a formal conveyance.

Rem. In many cases courts have power to order the present owners of real property to create new estates in it, or to transfer existing estates. So also they may empower persons other than the owners, such as guardians of infants or lunatics, and the executors or administrators of decedents' estates, to convey the lands of their wards or decedents by formal deeds. In such cases, though the authority or obligation to make the conveyance rests upon a judicial decree, the title of the grantee is properly a title by deed, since it is by virtue of the written conveyance that the estate vests in the grantee.

READ: 2 Bl. Com., pp. 285, 286;
Washburn, Real Property, §§ 2047–2059, 2077–2080;
Walker, American Law, § 55;
Andrews, American Law, §§ 285–295;
Clark, Elementary Law, § 216;
Tiedeman, Real Property, §§ 751–756, 758;
Kerr, Real Property, §§ 2300, 2302;
Pingrey, Real Property, § 1264, 1273, 1274;
Warvelle, Real Property, pp. 413–419;
Tiffany, Real Property, §§ 461–466.

§ 124. Of Title by Eminent Domain.

Title by eminent domain is the title whereby the State, or some person acting in its name and under its authority, acquires an estate in the real property of an individual when such property is needed for public use. The right to take private property for public use is inherent in every government, and may be exercised on behalf of purely governmental enterprises, or on behalf of individuals or corporations engaged in prosecuting works of a *quasi* public nature, such as railroads and canals. In this country the fundamental law provides that *adequate compensation* for the property thus taken must be made to the private owner. The mode of appropriating the property, and awarding the compensation, is usually prescribed in detail by local statutes which must be exactly followed, or the title will be void.

Rem. The State is the sole judge whether and to what extent private property shall be taken for an acknowledged public use, but whether or not a proposed use is public is a question for the courts, and may be raised in his defence by the individual owner of the land. Still, as public use includes whatever promotes public safety, convenience, or enjoyment, its scope is wide enough to cover almost any enterprise in which the State, or persons acting under its authority, may see fit to engage.

READ: 2 Kent Com., Lect. xxxiv, pp. 339, 340;
Cooley, Const. Lim., pp. 523–571;
Washburn, Real Property, § 1875;
Clark, Elementary Law, § 217;
Kerr, Real Property, §§ 2298, 2299;
Pingrey, Real Property, § 1272;
Rice, Real Property, §§ 354–362;
Kirchwey, Readings on the Law of Real Property, pp. 532–534;
Warvelle, Real Property, pp. 179–183;
Boone, Real Property, §§ 256–256 *d*;
Tiffany, Real Property, §§ 471–474.

§ 125. Of Title by Prior Occupation.

Title by prior occupation is the title by which the earliest occupant of real property acquires an estate therein. This is the primitive title on which all ownership ultimately rests, and still arises in many States under specified conditions in reference to mining, irrigation, and mill rights, and the distribution of public lands to private individuals. But with these exceptions there is now, within the territory of organized political com-

munities, no real property which does not belong to somebody, and hence none to which a title by prior occupation can be gained.

Rem. Under the rules of international law a title similar to that of prior occupation may arise, in lands not within the territory of any organized political community, in favor of States belonging to the family of nations whose explorers *first discover* and appropriate such lands.

READ: 2 Bl. Com., pp. 3–9, 258–362;
2 Kent Com., Lect. xxxiv, pp. 319–326;
3 Kent Com., Lect. li, pp. 377–390;
Woolsey, Int. Law, § 55;
Washburn, Real Property, §§ 1285, 1319, 1876;
Walker, American Law, §§ 175, 176;
Tiedeman, Real Property, §§ 681–683;
Pingrey, Real Property, §§ 19, 29–38;
Rice, Real Property, §§ 31, 32, 367;
Kirchwey, Readings on the Law of Real Property, pp. 492–494;
Warvelle, Real Property, pp. 131–141;
Boone, Real Property, § 408.

§ 126. Of Title by Estoppel.

Title by estoppel is the title by which one person acquires an estate or a *quasi* estate in real property as against other persons, by whose voluntary conduct he has been misled into relations to the property which those other persons could not now defeat without involving him in serious loss. This title is valid only against those owners of the property who have participated in the conduct which gave birth to the estoppel, and those whose title was derived, subsequently to the estoppel, from the persons on whose wrongful conduct it was based.

Rem. Rights arising by estoppel may be of any extent and variety, from a simple right of transitory enjoyment to complete and permanent dominion over the entire property; though eminent jurists with good reason assert that the right acquired can never be of higher legal character than a *quasi estate*. The nature and measure of the right, in any given case, is determined by the relations to the property into which the person relying on the estoppel has been misled.

READ: 3 Bl. Com., p. 308;
4 Kent Com., Lect. lvi, pp. 98, 99; Lect. lix, p. 261, notes;
Washburn, Real Property, §§ 1889–1943;
Barbour, Rights of Persons and Property, pp. 563–568;

Pingrey, Real Property, §§ 1201–1229;
Kirchwey, Readings on the Law of Real Property, pp. 535–541;
Warvelle, Real Property, pp. 189–193;
Boone, Real Property, §§ 253–253 *a*.

§ 127. Of Title by Grant.

Title by grant is the title by which one person acquires an estate in real property though the present voluntary act of its existing owner. To a grant *four things* are necessary: (1) A grantor able to create or transfer the estate; (2) A grantee able to receive the estate whenever, according to the terms of the grant, it is to take effect; (3) Property to which the estate, as created by the grant, can legally attach; (4) A voluntary lawful act on the part of the grantor creating or transferring the estate, and an actual or presumed acceptance of the estate on the part of the grantee. Where the State is the grantor the title conferred is called a "*title by public grant*"; where the grantor is a private individual or corporation the estate is said to be acquired by "*private grant.*"

Rem. All persons of normal status are able to be grantors or grantees. Infants, lunatics, married women, aliens, and persons under duress may be grantees unless the grant imposes upon them obligations which their defect of capacity forbids them to assume. The grants of persons of abnormal status are always voidable, upon proof that the grant was beyond their actual or legal capacity. An estate is presumed to be accepted by the grantee when he has the capacity to accept it and it is evidently for his benefit, unless he formally declines it after an opportunity to do so is presented to him.

READ: 2 Bl. Com., pp. 290–294;
Rob. Am. Jur., §§ 27, 28, 35, 42, 43, 45, 61, 62;
Washburn, Real Property, §§ 2099–2114, 2121–2124;
Walker, American Law, § 203;
Pingrey, Real Property, § 1276;
Jones, Real Property, §§ 1–153, 156–192;
Warvelle, Real Property, pp. 228–243;
Boone, Real Property, §§ 281–289.

§ 128. Of Title by Public Grant.

Title by public grant is the title by which a person acquires an estate in real property through the voluntary act of the State to whom the property belongs. The fee of all lands in

this country which have no other owner is vested in the State where the land is situated, and such lands may be granted by the State to private owners, either by a special legislative act or by a proceeding authorized by the general statutes. In the latter case the grant is usually made by a formal instrument called a "*patent,*" signed by the officer appointed for that purpose and sealed with the great seal of the State. The terms of this patent, when doubtful, are construed in favor of the State, unless the grantee has paid a valuable consideration for the property; then they are interpreted in his favor. A patent regularly issued is conclusive evidence of title. When two lawful patents conflict the elder will prevail.

Rem. The public lands belonging to the United States are distributed to individual owners under a Land System established by Acts of Congress, for a knowledge of which the Federal Statutes, and the regulations of the Department to whose management the system is entrusted, must be consulted.

READ: Washburn, Real Property, §§ 1995–2043;
Clark, Elementary Law, § 219;
Tiedeman, Real Property, §§ 744–747;
Kerr, Real Property, §§ 2277–2284;
Pingrey, Real Property, §§ 1230–1253;
Rice, Real Property, §§ 368–376;
Warvelle, Real Property, pp. 160–164, 204–218, 319–328;
Boone, Real Property, §§ 257–259;
Tiffany, Real Property, §§ 370–374.

§ 129. Of Title by Private Grant: Deeds.

Title by private grant is the title by which one person acquires an estate in real property belonging to another person, during the lifetime of that other person and by his voluntary act. The voluntary act which confers this title is now usually the execution and delivery of a deed. A *deed* is a writing sealed and delivered between the parties. It must be made by a *party able to contract,* and when obligations are incurred by the acceptance of the deed the grantee also must possess contracting power. It must be based upon a good *consideration,* such as the grantor's love and affection for the grantee; or upon a valuable consideration, such as money or services. It must be *written* or *printed* upon parchment or paper or some other durable material. Its *contents* must be legally and orderly set forth. It must be

free from any *erasures or interlineations* which affect its meaning unless they are noted and explained on the face of the deed itself. It must be *signed and sealed* by the grantor, whose signature must be *attested* by the required number of witnesses; and must be *acknowledged* by the grantor, before a proper magistrate, as his free act and deed. The *recording* of a deed, though not always essential to its validity between the parties, is necessary to protect the estate of the grantee against the creditors of the grantor and his subsequent *bona fide* purchasers or mortgagees.

Rem. The Statute of Frauds (A. D. 1677), required all contracts for the sale of any interest in lands to be in writing. This statute is still in force in this country, except as to leases for short periods. Prior to this statute conveyances of freehold, not made by livery of seisin, were effected by sealed instruments called deeds. Hence, modern deeds are both signed and sealed. The number of witnesses required varies according to local law, — in some States one is sufficient, in others two or more are necessary. The mode of acknowledgment and record is also fixed by local laws. When deeds contain stipulations by both parties they are usually prepared in duplicate, and mutually executed by the parties, and one copy is delivered to each for preservation. Such deeds are called *indentures*, because in ancient times both instruments were written on one piece of parchment which was then divided by a toothed incision, by the matching of whose edges the identity of the indented parts could subsequently be determined. A deed executed by the grantor alone is known as a *deed-poll*.

READ: 2 Bl. Com., pp. 295–298, 305–308;
4 Kent Com., Lect. lxvii, pp. 450–459;
Washburn, Real Property, §§ 2081–2098, 2125, 2188–2215;
Walker, American Law, § 202;
Clark, Elementary Law, § 219;
Tiedeman, Real Property, §§ 783–803, 807–810, 816–819, 824;
Kerr, Real Property, §§ 2305–2322, 2326, 2330, 2342–2344;
Pingrey, Real Property, §§ 1277–1299, 1310–1316, 1329–1369, 1371;
Jones, Real Property, §§ 211, 212, 263–310;
Rice, Real Property, §§ 377, 380–382, 389, 391, 393;
Warvelle, Real Property, pp. 164–166, 199–203, 219–222, 243–247, 288–298, 304–314, 317, 318;
Boone, Real Property, §§ 276–280, 292–293 *a*, 297, 319–321 *a*;
Tiffany, Real Property, §§ 379–381, 384–386, 402–405, 475–492, 501–505 *a*.

§ 130. Of Title by Private Grant: the Species of Deeds.

Deeds, in reference to their effect, are either Original Deeds or Derivative Deeds. An *original deed* creates a new estate. A *derivative deed* either modifies or destroys or transfers an existing estate. Original deeds are of six species: (1) *Feoffment,* creating a fee simple; (2) *Gift,* creating a fee tail; (3) *Grant,* creating an incorporeal hereditament; (4) *Lease,* creating any estate less than that of the grantor; (5) *Exchange,* creating mutual estates in consideration of each other; (6) *Partition,* creating estates in severalty between joint tenants. Derivative deeds are of five species: (1) *Release,* which transfers to the present particular tenant the estate in reversion or remainder; (2) *Surrender,* which transfers to the remainderman or reversioner the present particular estate; (3) *Assignment,* which transfers to a stranger the exact estate of the grantor; (4) *Confirmation,* which cures some defect in a former estate, and thus renders a voidable estate sure and unavoidable; (5) *Defeasance,* which accompanies another deed, and under certain conditions destroys or modifies the estate thereby created. These eleven species of deeds were known to the law before the Statute of Uses was adopted. The doctrine of that Statute led to the employment of three additional species: (1) *Bargain and Sale,* which creates an equitable estate for a valuable consideration, the equitable estate being enlarged by the Statute into a legal estate; (2) *Covenant to Stand Seised,* by which the grantor, in consideration of family love and affection, agrees to hold the legal estate for the use and benefit of his wife, son, or other near blood relation; (3) *Lease and Release,* by which the grantor first conveys to the grantee, for valuable consideration, an equitable estate for years, and after this estate takes effect in possession further releases to him the reversionary interest in fee,— whereby the equitable estate for years is merged in the legal estate in fee, while the grantee being already in possession under the lease no livery of seisin of the legal estate is necessary.

Rem. In this country the present tendency is to *reduce the number* and simplify the forms of these conveyances. In some States a deed of bargain and sale for the creation and confirmation of estates, and a release for their transfer, modification, or

destruction, are the principal instruments employed. The legal character of a deed, however, is determined by its intended effect and not by its form or name, and when its legal character is ascertained its interpretation and validity are governed by the rules peculiar to the species to which it belongs.

READ: 2 Bl. Com., pp. 309–327, 338, 339;
4 Kent Com., Lect. lxvii, pp. 480–496;
Washburn, Real Property, §§ 2229–2264, 2287;
Walker, American Law, § 200;
Clark, Elementary Law, §§ 220, 221;
Tiedeman, Real Property, §§ 768–782;
Kerr, Real Property, §§ 2285–2297;
Pingrey, Real Property, §§ 1254–1263;
Jones, Real Property, §§ 193–210;
Rice, Real Property, § 388;
Kirchwey, Readings on the Law of Real Property, pp. 416–445, 502–512;
Warvelle, Real Property, pp. 170, 171, 335–353;
Boone, Real Property, § 324;
Tiffany, Real Property, §§ 375–378.

§ 131. Of Title by Private Grant: the Contents of Deeds.

The various provisions contained in deeds may be distributed into seven parts: (1) The *Premises,* describing the parties, the consideration, and the property: (2) The *Habendum,* describing the estate granted; (3) The *Tenendum,* describing the tenure on which, and the uses for which, the estate is to be held; (4) The *Reddendum,* describing the matters reserved to the grantor out of the estate granted; (5) The *Conditions,* describing the contingencies on which the estate granted is to vest, enlarge, or be defeated; (6) The *Covenants,* setting forth the stipulations of the parties as to any matters relating to the estate; (7) The *Conclusion,* comprising the execution, attestation, and acknowledgment. Not all these parts are required in every deed, but when employed they should occupy their relative positions.

Rem. In the *premises* the parties should be designated by their true names or official titles; and some consideration, though not necessarily the true one, should be stated. The *description* of the property conveyed must be so complete and accurate that on applying it to the property its precise boundaries can be ascertained. The *tenendum* being no longer used to denote the tenure is generally combined with the *habendum*

in the phrase "*to have and to hold,*" followed by the specification of the character of the granted estate. The *reddendum,* or reservation, creates a new estate in the grantor and must therefore contain the words of creation which would be necessary if the estate were conveyed by an independent deed. An *exception* differs from a reservation in that it creates nothing, but simply prevents the excepted property from becoming subject to the operation of the deed, and therefore is a part of the description of the granted property, and belongs in the premises. The *conditions* may be framed to suit the parties, provided they are lawful and possible, and do not impose undue restraints on marriage or alienation. The *covenants* ordinarily are three: *first,* the covenant of seisin, in which the grantor stipulates that he has a right to convey the property as the deed does convey it; *second,* the covenant against incumbrances, in which he stipulates that the estate granted is subject to no limitations except those mentioned in the deed; *third,* the covenant of warranty, in which he stipulates to defend at his own cost the title he confers, and, if it fails, to compensate the grantee for the defects in the estate. In release or quitclaim deeds these covenants are usually omitted. In leases they are often numerous and coupled with conditions forfeiting the estate. In the *conclusion* the mode of signing, sealing, attesting, and acknowledgment must conform to the local law of the State where the property is situated, or the deed will be void as a conveyance, though it may be sustained and enforced in equity as a contract to convey.

READ: 2 Bl. Com., pp. 298–304;
4 Kent Com., Lect. lxvii, pp. 460–480;
Washburn, Real Property, §§ 2115–2120, 2265–2294, 2352–2414;
Walker, American Law, § 204;
Harris on Identification, §§ 35–139;
Andrews, American Law, § 620;
Tiedeman, Real Property, §§ 825–840, 843–846, 849–863;
Kerr, Real Property, §§ 2323, 2324, 2331–2341;
Pingrey, Real Property, §§ 1370–1376, 1382–1465;
Jones, Real Property, §§ 213–262, 311–990;
Rice, Real Property, §§ 378, 390;
Warvelle, Real Property, pp. 222–228, 247–249, 251–262, 271–287;
Boone, Real Property, §§ 290, 291, 299–303 *a,* 308–318;
Tiffany, Real Property, §§ 258–261, 382, 383, 387–393, 394–401.

§ 132. Of Title by Private Grant: the Execution of Deeds.

The grantor may *sign and seal* the deed himself, or it may be done by a bystander in his presence at his request, or if he is unable to write he may make his mark and a bystander may add a written explanation which completes the signature. Any

seal may be adopted for the time being as his own by the grantor. The execution of a deed in the absence of the grantor can be effected only by his duly authorized *attorney in fact,* whose power of attorney should also be in writing under seal, and be recorded with the deed. A grantor is *presumed to know* and understand the contents of his deed before he executes it; and if he cannot read it and conceals the fact, or if being able to read it he neglects to do so, he is bound by the deed, however far it may depart from his intention, unless some fraud has been practised upon him.

Rem. When the deed of a grantor who is accustomed to write his own name is signed for him by a bystander it is advisable to state this fact and the reason therefor in writing in connection with the signature. When the signature is made by mark, the mark consists of a cross × preceded by the Christian name and followed by the surname of the grantor, with "*his*" written over the mark and "*mark*" below it. Signature by an attorney in fact is in the form "*A. B. by C. D. his attorney in fact.*" The seal must in some States be of an *impressible substance* like wax or wafer, according to the ancient custom; in other States, a written or printed *scroll* containing the letters L. S. or the letters alone, or an embossed design, are sufficient. The signatures of the witnesses must be affixed and the acknowledgment be made after the execution by the grantor is completed.

READ: 2 Bl. Com., pp. 304–306;
4 Kent Com., Lect. lxvii, pp. 452, 453;
Washburn, Real Property, §§ 2125–2142;
Tiedeman, Real Property, §§ 804–806, 811;
Kerr, Real Property, § 2325;
Pingrey, Real Property, §§ 1300–1310, 1317;
Jones, Real Property, §§ 1000–1216;
Warvelle, Real Property, pp. 314, 353–359;
Boone, Real Property, §§ 287 *a*, 294, 298;
Tiffany, Real Property, § 408.

§ 133. Of Title by Private Grant: the Delivery of Deeds.

The estate created by a deed passes from the grantor to the grantee by the *delivery of the deed,* and hence unless it is delivered during the life of the grantor it will be of no effect. A deed is not delivered until it is placed by the grantor within the permanent control of the grantee, and beyond the power of the grantor to recall it. Thus to hand it to the grantee for in-

spection, or for a search of title or the opinion of counsel, is not delivery. But if the grantor gives it to the grantee or his agent, or leaves it where they can take it, with intent thereby to make delivery, or puts it on record for the grantee, — this completes the act of conveyance and perfects the estate in the grantee.

Rem. A deed may be entrusted by the grantor to a third party, to be by him delivered to the grantee at a future time or upon the occurrence of a contingent event. If the third party is the agent of the grantor only and the grantor thus has power to reclaim and destroy the deed, no step toward delivery has yet been made. But if, according to the intention of the parties, the third person receives the deed on behalf of the grantee, the grantor has no right to recall it although the title does not pass to the grantee until the delivery of the deed to him, and meanwhile the possession and enjoyment of the property remain in the grantor. A deed of this character is called an *escrow*, and when it is delivered to the grantee his title under it will relate back to the date of its execution, if such was the evident intention of the grantor.

READ: 2 Bl. Com., p. 307;
4 Kent Com., Lect. lxvii, pp. 454–456;
Washburn, Real Property, §§ 2143–2187;
Tiedeman, Real Property, §§ 812–815;
Kerr, Real Property, §§ 2327–2329;
Pingrey, Real Property, §§ 1318–1328;
Jones, Real Property, §§ 1217–1327;
Rice, Real Property, § 384;
Warvelle, Real Property, pp. 298–301, 302–304;
Boone, Real Property, §§ 295, 296;
Tiffany, Real Property, §§ 406, 407.

§ 134. Of Title by Private Grant: the Interpretation of Deeds.

A *deed is construed* according to the intent of the parties so far as this can be ascertained from the terms of the deed itself. In interpreting the terms of the deed the situation of the parties, the character of the property, the circumstances attending the transaction, and the general purpose which the parties have in view may be considered. Where doubt remains after all recourse to such external aid, the doubtful terms must be construed in the manner most favorable to the grantee. When different statements in a deed are contradictory, the first statement prevails. An *unintelligible deed* is absolutely void.

Rem. Where the premises imperfectly describe *the property conveyed*, those boundaries which are determined by fixed monuments control all others; if no fixed monuments are mentioned, compass courses and measured distances stand next in authority; if these are absent, estimated quantities and other general designations may be followed. The grant of a *principal article* of property carries its *incidental* necessary privileges, if these belong to the grantor; but land does not pass as incidental to land, nor by the term "*appurtenances.*" A deed absolute in form, if intended to secure a debt, is construed as a mortgage.

READ: 2 Bl. Com., pp. 379–381;
4 Kent Com., Lect. lxvii, pp. 467, 468;
Washburn, Real Property, §§ 2240, 2294–2351;
Tiedeman, Real Property, §§ 827–829, 841, 842;
Pingrey, Real Property, §§ 1377–1381;
Jones, Real Property, §§ 381–409, 516–535, 1635–1664;
Rice, Real Property, §§ 383, 385, 386;
Warvelle, Real Property, pp. 51, 52, 249–251, 315–317;
Boone, Real Property, §§ 304–307.

§ 135. Of Title by Private Grant: the Revocation of Deeds.

A deed creating or transferring an *estate of freehold*, having been once delivered, *cannot be revoked* and the estate be extinguished by the destruction of the deed or its return to the grantor; but a new deed must be executed and delivered by the grantee to the grantor for that purpose. An *estate less than freehold* may be surrendered and extinguished by subsequent agreement of the parties, and the resumption of possession by the grantor, without a formal reconveyance. Moreover, a court of *equity may rescind* a deed for fraud or mutual mistake, and either directly decree the estate to be in the grantor or compel the grantee to transfer it to him by a deed.

Rem. It may sometimes happen that the parties to a deed, in ignorance of the law, agree to rescind the conveyance, and without making a new deed destroy the old and leave the property in the possession of the grantor. In such cases, if it is now too late to make a reconveyance or the grantee should refuse to do so, the courts may recognize a *title by estoppel* in the grantor as against the formal title of the grantee. Where the deeds of persons of abnormal status are voidable on that account, they may be avoided when the legal capacity of the parties is restored.

READ: Washburn, Real Property, §§ 1907, 2182;
Tiedeman, Real Property, § 741;
Warvelle, Real Property, pp. 301, 302;
Boone, Real Property, §§ 322, 323.

§ 136. Of Title by Private Grant: Voluntary and Fraudulent Conveyances.

A *voluntary conveyance* is a private grant without valuable consideration. It may be made to a near relative out of love and affection, or to a stranger without any consideration. It is valid against the grantor, and unless it imperils the interests of creditors or *bona fide* purchasers is valid against third parties also. A *fraudulent conveyance* is a private grant made by the grantor for the purpose of placing the property beyond the reach of his creditors. It may or may not be a voluntary conveyance, but if it is on valuable consideration it is not void unless the grantee knew of and participated in the fraudulent purpose of the grantor. The *remedy of creditors* against voluntary and fraudulent conveyances is by proceedings in a court of equity to set aside the conveyance and permit the levy of an execution on the property. A *subsequent bona fide purchaser* may also resort to equity for the removal of the cloud which the invalid conveyance casts on his own title, and for an injunction forbidding the grantees under it to assert their claim. These remedies are, however, unavailing against persons who in good faith and for valuable consideration have purchased the property from fraudulent grantors or grantees, — the law regarding the price paid as assets to which creditors and defrauded purchasers must look for compensation.

Rem. The rules concerning voluntary and fraudulent conveyances are derived mainly from statutes enacted in the 13th and 27th Elizabeth (A. D. 1670, 1684), as interpreted by the courts of England and the United States. Concerning the *right of creditors* to defeat a *voluntary conveyance* two views are taken: (1) that any outstanding debt against the grantor at the date of the conveyance renders it invalid against the claim of that particular creditor; (2) that if the grantor, at the date of the conveyance, retained in his own hands, and within the reach of process, property sufficient to pay all his then existing debts the voluntary conveyance will be valid and vest a good title in the grantee. In reference to the effect of a *voluntary conveyance* on the rights of a *subsequent bona fide purchaser* two opinions are also maintained: (1) that the voluntary conveyance is valid against the purchaser when he bought the property with notice of the prior voluntary grant; (2) that the voluntary conveyance is invalid against the purchaser though he bought the property

with knowledge that such a conveyance had been made. Concerning the effect of a *fraudulent conveyance* on the *rights of creditors* two doctrines are current in the courts: (1) that a fraudulent conveyance is always void as against the creditors whom it was the purpose of the grantor to defraud, whether the indebtedness then existed or was intended to be subsequently incurred; (2) that if the conveyance was fraudulent as against any creditor at the time it was made, it is void as against all creditors and cannot be sustained against a subsequent indebtedness not contemplated by the grantor at the date of the grant.

READ: 2 Bl. Com., pp. 296, 297, notes;
2 Kent Com., Lect. xxxviii, pp. 440–443;
4 Kent Com., Lect. lxvii, pp. 463, 464;
Washburn, Real Property, §§ 2224–2228, 2272;
Walker, American Law, §§ 201, 210;
Tiedeman, Real Property, § 802;
Rice, Real Property, § 392;
Boone, Real Property, § 289 *a*;
Tiffany, Real Property, §§ 494–497;
Bolles, Important English Statutes, p. 70, *Act 13th Elizabeth;* p. 72, *Act 27th Elizabeth.*

§ 137. Of Title by Devise: Wills.

Title by devise is the title by which a person acquires an estate in real property at the death of its former owner, by virtue of a voluntary disposition of it in his favor by the former owner. The means by which this disposition is made is called a *will*. A *will of lands* must be in writing and be signed by the testator. At the time of making it the *testator* must be *of sufficient age* as determined by the local law; *of mental capacity* enough to understand the general character and amount of his property and the legal effect of the will as he makes it; and *free from coercion* or undue influence on the part of other persons. It must be *signed* by the testator, and *declared* by him to be his will, in the presence of the prescribed number of witnesses, who must subscribe the *attestation* in his presence and, according to the laws of some States, in presence of each other. The local law may also require it to be *sealed*. After its execution a will remains *ambulatory*, and subject to change or revocation, until the death of the testator. Then it must be submitted by the executor to the proper Court of Probate, whose approval renders it effective to transfer the estate as of the date of the testator's

death. Any *estate,* legal or equitable, which does not violate the Rule against Perpetuities, and otherwise is not unlawful, may be created by devise. But the devisee is not obliged to *accept* it, though if clearly beneficial to him he is presumed to do so; and where the devise is conditioned on his relinquishment of other rights, he may elect between them after the death of the testator.

Rem. The modern law regarding a will of lands rests on the Statute of Wills enacted in 32 Henry VIII (A. D. 1540–41) and its judicial interpretations. Prior to the Conquest wills of lands had been employed to a limited extent. Under the Norman feudal system they seem to have disappeared except by special custom in a few localities. When the doctrine of uses was established attempts were made to accomplish the same purpose by means of future uses created to take effect at the testator's death. The Statute of Uses (A. D. 1535) rendered these no longer possible. Five years afterwards the Statute of Wills conferred the power to devise their lands upon persons holding by certain tenures, and this power was extended by statute at the Restoration of Charles II, to all classes of tenures and all species of real property. These Statutes were recognized as part of the law of the American colonies, and thence with certain modifications in detail have become incorporated in our law.

READ: 2 Bl. Com., pp. 373–379, notes;
4 Kent Com., Lect. lxviii, pp. 501–520;
Washburn, Real Property, §§ 2415–2450, 2478, note;
Barbour, Rights of Persons and Property, pp. 340, 341;
Walker, American Law, §§ 194, 195;
Andrews, American Law, § 621;
Tiedeman, Real Property, §§ 872–885, 890 *a*–893;
Pingrey, Real Property, §§ 1466–1495, 1507, 1508;
Jones, Real Property, §§ 1328–1591;
Rice, Real Property, §§ 394–399;
Kirchwey, Readings on the Law of Real Property, pp. 513–524;
Warvelle, Real Property, pp. 172–175, 420–428, 454–456;
Boone, Real Property, §§ 325–334;
Tiffany, Real Property, §§ 409–416;
Rice, American Probate Law, pp. 98–137, 206–247;
Page on Wills, §§ 1–311;
Bolles, Important English Statutes, p. 40, *Statute of Wills;* p. 62, *Statute of Wills Extended.*

§ 138. Of Title by Devise: Revocation of Wills.

A *will may be revoked* by the testator during his lifetime either by destroying it, or by making a later will containing words

of revocation or by new devises inconsistent with the old, or by acts affecting the property which render it impossible for the will to take effect. A *will is destroyed* when the testator, being in his right mind and with intent to revoke the will, tears or burns or mutilates it in a part essential to its validity, though the rest of the instrument remains intact. A *later will* may revoke a former one expressly as a whole, or only so far as its provisions are incompatible therewith. A partial revocation is usually accomplished by a *codicil*, or formal addition to the old will, duly executed like the will itself and making such changes as the testator desires. The devise of specific property is revoked if the *testator alienates* that property before his death. A *will once revoked may be revived* by the testator by re-execution or, if not totally destroyed, by republication or by confirmation in a codicil annexed thereto.

Rem. Changes in the condition of the testator himself, and in his consequent legal relations, have sometimes been treated as sufficient to revoke a will. Thus his marriage, and the birth of a child for whom his pre-existing will did not provide, may work a revocation; as also may the birth of subsequent children unless contemplated by the former will. The marriage of a *feme sole* revokes her prior will, without the birth of children, so far as it conflicts with the rights which the law confers upon her husband by the marriage. Contracts made by a testator after the execution of his will, and enforcible in equity against the property devised, also operate as a revocation *pro tanto* of the provisions of the will.

READ: 2 Bl. Com., p. 376;
4 Kent Com., Lect. lxviii, pp. 520–534;
Washburn, Real Property, §§ 2468–2477;
Barbour, Rights of Persons and Property, pp. 345–347;
Walker, American Law, § 196;
Tiedeman, Real Property, §§ 886–890;
Pingrey, Real Property, §§ 1496–1506, 1531–1536;
Rice, Real Property, §§ 401, 402;
Warvelle, Real Property, pp. 428, 429;
Boone, Real Property, §§ 335–340;
Tiffany, Real Property, §§ 417–420.

§ 139. Of Title by Devise: Interpretation of Wills.

A *will is construed* according to the intent of the testator, so far as that intent is lawful and can be ascertained. *Extrinsic facts* may be resorted to in order to explain the language of the

will, and even the *language* will be *departed from* if it is manifest that words have been improperly omitted or employed. The *construction* is also *made upon the entire will* as a whole so that, if possible, effect may be given to every part thereof. When two of its *provisions are repugnant* to each other the last, being the latest utterance of the testator on the subject, will prevail. So far as the provisions of the will relate to real property they are interpreted and applied according to the *lex rei sitæ* or law of the State where the property is situated.

Rem. The latitude allowed in the interpretation of wills in order to carry out the intention of the testator is, by no means, without its limitations. Thus a testator cannot create an estate abolished by law, or one never known to the law, nor confer rights which the law is unable to protect. Where he employs technical legal expressions he is presumed to use them in the legal sense, and therefore he should avoid them unless he understands their meaning and intends their ordinary effect. The courts cannot prevent the mischief caused by unskilled conveyancers, by rescinding or departing from well-established legal rules, even although the unfortunate testator has now no power to correct their mistakes.

READ: 2 Bl. Com., p. 381;
4 Kent Com., Lect. lxviii, pp. 534–544;
Washburn, Real Property, §§ 2451–2467;
Barbour, Rights of Persons and Property, pp. 341–345;
Walker, American Law, §§ 198, 199;
Andrews, American Law, § 845;
Kerr, Real Property, §§ 339–390;
Pingrey, Real Property, §§ 1509–1530, 1537–1541;
Rice, Real Property, § 400;
Warvelle, Real Property, pp. 429–454;
Rice, American Probate Law, pp. 138–205;
Page on Wills, §§ 456–709, 806–823.

SECTION III

OF PERSONAL PROPERTY

§ 140. Of the Nature of Personal Property.

Personal property comprises all those subjects of ownership which are governed by the Law of Personal Property. They possess the following *legal characteristics:* (1) They are regulated, as a general rule, by the *lex domicilii* of their owner;

(2) They can be conveyed without a deed; (3) They pass on the death of their owner intestate, by operation of law, to his executor or administrator and not to his heir; (4) They are not, except by statute or in peculiar cases, recoverable in specie in an action at law by the owner when he has been deprived of their possession. Whether or not any given article has these characteristics, at any given place and time, depends upon the current local law.

Rem. Articles of personal property are often called *chattels* (from *catella*, cattle, once the chief species of movable property) and are divided into Chattels Real and Chattels Personal. A *chattel real* is a thing which in itself is personal but which is so related to the realty as to be governed in part by the Law of Real Property. To this class belong the title deeds of land, heirlooms or chattels which descend with the estate, and estates less than freehold where the estate is personal though the property is real. A *chattel personal* is any chattel other than a chattel real, whether it be movable or immovable, corporeal or incorporeal. To this class belong all tangible objects which, in contemplation of law, are not immovably attached to land; all transient rights in or concerning corporeal personal property; all rights to the labor or services of others; and all rights to demand and receive payments of money whether arising out of contracts or any other form of obligation.

READ: 2 Bl. Com., pp. 384–388;
2 Kent Com., Lect. xxxv, pp. 340–342;
Barbour, Rights of Persons and Property, pp. 580, 581, 590–593;
Clark, Elementary Law, §§ 222, 224;
Kirchwey, Readings on the Law of Real Property, pp. 13–16;
Darlington, Personal Property, pp. 1–29;
Brantly, Personal Property, §§ 3, 5;
Smith, Personal Property, §§ 17, 21;
1 Schouler, Personal Property, §§ 1–10, 20, 21, 44–46, 94–99, 295–299;
Kerr, Real Property, §§ 63, 64;
Warvelle, Real Property, p. 49;
Boone, Real Property, § 3.

§ 141. Of Chattels Personal: Choses in Possession: Choses in Action.

Chattels personal are also called *"choses"* (from *chose*, a thing), and are divided into two classes: (1) Choses in Possession; and (2) Choses in Action. A *chose in possession* is a

chose which is, at the *present moment,* under the control of its owner. This control may be actual or constructive; *actual* when the chose is in the hands of its owner or of his servant, or in some place of deposit which he has selected for it; *constructive* when though not within his immediate physical dominion it is either in the hands of no one, like lost goods or stray cattle, or is in the hands of some one from whom he can at any time reclaim it, like a borrower, a finder, or a thief. *A chose in action* is a chose to whose enjoyment the owner has a right, but of which he has *not at present* either the actual or constructive control. It is so called because an *action,* or suit at law or equity, may become necessary to reduce it to possession. The same chose may be at the same time a chose in possession as to one person, and a chose in action as to another. Thus an article of property, entrusted by a third person to his agent A, to be delivered immediately to B the true owner, is a chose in possession in A by virtue of his right to its temporary control, and a chose in action in B because, though his right to it may be asserted against A at any moment, he may be compelled to sue A in order to obtain it.

Rem. The name, *chose in action,* is used in *three applications:* (1) To denote the chose itself which it may be necessary to bring an action in order to obtain; (2) To denote the right of the owner to the control of the chose; (3) To denote the documentary evidence of the existence of the right. Thus a sum of money due on a promissory note is a chose in action, since a suit may be needed to collect it. So, also, the right to the money is a chose in action because an action may be required to enforce it. Again, the note itself by which the existence of the right is demonstrated, and which must be put into suit in order to collect the money, is by that figure of speech which gives to a visible symbol the name of the thing signified, a chose in action. Some confusion arises out of this multiplicity of meanings. Frequently, the phrase is used in the second sense, denoting the right which is to be asserted by the action; when used in the other senses the context generally indicates the meaning intended by the writer. Some authorities, indeed, identify choses in action with incorporeal personal property, as if there could be no choses in action other than mere incorporeal rights; but the two concepts are really quite distinct, — the latter denoting the permanent essential character of the chose, the former only its temporary legal relations.

READ: 2 Bl. Com., pp. 389, 397;
2 Kent Com., Lect. xxxv, p. 351;
Barbour, Rights of Persons and Property, pp. 584–586;
Clark, Elementary Law, § 223;
Darlington, Personal Property, pp. 107–112, 179–191;
Brantly, Personal Property, § 6;
Smith, Personal Property, §§ 22, 24;
1 Schouler, Personal Property, §§ 11–19, 71–87.

ARTICLE I

OF ESTATES IN PERSONAL PROPERTY

§ 142. Of the Duration of Estates in Personal Property.

Estates in personal property resemble estates in real property in reference to their duration, as well as their other attributes, so far as the difference in the nature of the property permits. Strictly speaking a chattel, not being inheritable, cannot become the subject of an *estate in fee*. But the complete and exclusive ownership of a chattel is closely analogous to a fee-simple estate, and clothes its owner with power to do with it as he will. Estates *less than a fee*, as for life, for years, or at will, may be created in a chattel with an ultimate reversion to the owner and his representatives; and such estates are governed by the same general rules which regulate similar estates in real property.

Rem. The principal characteristic of complete and exclusive ownership in personal property is the right to make a final disposition of it, as by consuming it or by selling it and expending the proceeds. This test is frequently applied in the interpretation of wills, when doubt exists whether a bequest of personal property should be treated like a fee, or like a limited estate with subsequent rights in other legatees.

READ: Dwight, Law of Persons and Property, pp. 447, 448, 456, 457;
Clark, Elementary Law, § 225;
Darlington, Personal Property, pp. 278–301;
Brantly, Personal Property, §§ 119–122.

§ 143. Of Absolute and Conditional Estates in Personal Property.

Estates in personal property may be limited to take effect as *absolute* or as *conditional* estates; and, if conditional, upon condition precedent or subsequent. These conditions may

arise from contract, or may be imposed on the estate by the nature of the property itself. When they arise from contract they are interpreted and enforced like similar conditions attached to estates in real property. When they arise from the nature of the property the estates are called *qualified estates*, because they depend for existence on some quality which inheres in the property itself.

Rem. The principal species of personal property in which a qualified estate alone can be enjoyed by man are: (1) The elements and forces of nature; (2) Animals *feræ naturæ;* (3) Dead human bodies. The *elements and forces of nature*, when not yet brought under human control, belong to no one. When detached portions of them, so to speak, are imprisoned and utilized by man they constantly tend to escape from confinement and return to their natural condition. Property rights, therefore, can reside in them only while they remain in the actual or constructive possession of the person who claims them, and when this possession ceases all vestiges of ownership disappear. Animals *feræ naturæ* are distinguished from domestic animals in which an absolute estate can be enjoyed, by their disposition to depart from their owners and not to return unless forcibly reclaimed. This distinction is drawn between species of animals, not between individuals, — some species being legally domestic, and others legally wild. Animals *feræ naturæ* belong to no one except the general public, unless they are in actual captivity or under constructive control like fish in private ponds or birds while nesting on private land; and when they escape from captivity or constructive control are again public property, and may be taken by any one subject to the provisions of local laws. *Dead human bodies* were once regarded as not subject to property rights. Under modern authorities a corpse may belong to a surviving wife or husband or next of kin for purposes of interment, and after burial becomes the property of the owner of the land in which it is deposited. Portions of human bodies, preserved for scientific purposes, may by owned like other chattels.

READ: 2 Bl. Com., pp. 389–396;
2 Kent Com., Lect. xxxv, pp. 347–350;
Barbour, Rights of Persons and Property, pp. 581–584;
Dwight, Law of Persons and Property, pp. 449–456;
Tiffany, Real Property, §§ 271, 272;
Darlington, Personal Property, pp. 29–32;
Brantly, Personal Property, §§ 74–84, 97;
Smith, Personal Property, § 4;
1 Schouler, Personal Property, §§ 48–52;
Perley, Mortuary Law, pp. 20–210.

§ 144. Of Present and Future Estates in Personal Property.

Estates in personal property may be created to take effect in the future as reversions, remainders, or executory interests, unless the use of the property by the present particular tenant involves its entire consumption. Such estates are governed, so far as the nature of the property allows, by the same rules as similar estates in real property. But if the property is perishable it is generally held to be the duty of the particular tenant to convert it into money and invest the proceeds, taking the income for himself and holding the principal for the benefit of the remainderman or reversioner.

Rem. The particular tenant of personal property is liable to the holder of the future estate for waste, either actual or permissive; and the latter may invoke the aid of a court of equity to protect his rights, even if necessary by the appointment of a receiver to manage the property in the interest of all its owners.

READ: 2 Bl. Com., p. 398;
2 Kent Com., Lect. xxxv, pp. 352–354;
Barbour, Rights of Persons and Property, pp. 586, 587;
Dwight, Law of Persons and Property, pp. 460–467;
Darlington, Personal Property, pp. 33–35;
Brantly, Personal Property, §§ 110–118;
Smith, Personal Property, § 25;
1 Schouler, Personal Property, §§ 134–153.

§ 145. Of Joint and Several Estates in Personal Property.

Estates in personal property may be held in *severalty, joint tenancy, entirety, partnership,* or in *common,* according to the terms in which the estate is created or the operation of law upon the circumstances out of which it arises. Here also the rules governing analogous estates in real property are applied, as far as practicable. Ordinarily in all co-tenancies of personal property the *possession* of one co-tenant is the possession of all, and consequently neither can reclaim its possession from the others by proceedings at law. This doctrine, where the article is indivisible and incapable of joint use by the tenants, gives to the actual possessor an inequitable advantage over his co-tenants which can be remedied only by a partition.

Rem. Any co-tenant of an estate in personal property has a right to its partition, where the property is itself divisible. If

it is indivisible, a court of equity may direct it to be sold and the proceeds distributed among the tenants according to their respective shares; or if this be inexpedient its alternate use may be decreed, or any other method of enjoyment ordered which will secure to all the parties their equitable rights.

READ: 2 Bl. Com., p. 399;
2 Kent Com., Lect. xxxv, pp. 350, 351;
Barbour, Rights of Persons and Property, pp. 725–727;
Dwight, Law of Persons and Property, pp. 458–460;
Walker, American Law, § 151;
Darlington, Personal Property, pp. 302–314;
Brantly, Personal Property, §§ 99–109;
Smith, Personal Property, §§ 26–31;
1 Schouler, Personal Property, §§ 154–167.

ARTICLE II

OF TITLE TO ESTATES IN PERSONAL PROPERTY

§ 146. Of the Acquisition of Estates in Personal Property.

Estates in personal property may be *acquired* either by operation of law, or by the sole act of the former or of the present owner, or by the joint act of the present and the former owner. *Title by operation of law* is of five species: (1) Title by Prerogative; (2) Title by Forfeiture; (3) Title by Succession; (4) Title by Marriage; (5) Title by Judicial Decree. *Title by the sole act of the former or of the present owner* is of four species: (1) Title by Occupancy; (2) Title by Accession; (3) Title by Confusion; (4) Title by Creation. *Title by the joint act of the present and the former owner* is of three kinds: (1) Title by Gift; (2) Title by Testament; (3) Title by Contract.

Rem. Most of the rules of law which are peculiar to personal property relate to the titles by which it may be acquired. Of these titles many are so wide in extent and copious in detail as to form the subjects of separate Departments of the Law; as Title by Creation is the subject of Patent and Copyright Law; Title by Succession and Title by Testament are the subjects of Probate Law; and Title by Gift and Title by Contract are the subjects of the Law of Contracts. For this reason few treatises of any magnitude on personal property have been prepared and published, — the legal student finding the material for his investigations in the great text-books and leading cases pertaining to these Departments of the Law.

READ: Dwight, Law of Persons and Property, p. 468;
Clark, Elementary Law, § 226;
Darlington, Personal Property, pp. 357–367;
Smith, Personal Property, § 32;
2 Schouler, Personal Property, §§ 2–4.

§ 147. Of Title by Prerogative.

Title by prerogative is the title by which the State acquires an estate in private personal property which may be needed for public use, or over which all former owners have permanently lost their dominion. By a right akin to that of eminent domain the government may take *any species* of personal property, except coin of the realm, whenever it may be required for public use, upon making due compensation to the owner. Personal property over which former owners have entirely lost their dominion, such as *goods captured* from an enemy in time of war, or thrown away by a thief in his flight, or hidden under ground, or lost at sea, or washed upon the shore, if *no owner can be found*, and straying cattle which no one reclaims, vests in the State by the same title, and may either be appropriated to public use or distributed to individuals under the provisions of local laws. Articles accidentally lost on land, and which the *owner may possibly trace* and recover, do not change their ownership by being found and held by other persons: but remain not only under the dominion but in the constructive possession of their owner until by some act or neglect on his part, or in pursuance of some local law, his right to their recovery lapses and the actual possessor becomes entitled to retain them.

Rem. The right of *taxation*, like the foregoing title, rests upon the sovereign prerogative of the State, but does not, like that title, result directly in the acquisition by the State of a specific article of personal property. Under this right the government may impose burdens upon the subject to any amount and under any form by which an obligation to pay money may be created; but the primary result is a debt due by the subject to the State which may be collected by process against his person or property, and for failure to pay which the property itself may be forfeited to the State. Hence the title to specific property which the State acquires as the remote result of taxation is rather a title by forfeiture, or a title by judicial decree or execution, than a true title by prerogative.

READ: 1 Bl. Com., pp. 290–299;
2 Bl. Com., pp. 408–411;
1 Kent Com., Lect. v, p. 101;
2 Kent Com., Lect. xxxvi, pp. 356–360;
Dwight, Law of Persons and Property, pp. 469–472, 557–559;
Walker, American Law, §§ 51, 81;
Andrews, American Law, §§ 215–236;
Clark, Elementary Law, § 229;
2 Schouler, Personal Property, §§ 9–13, 17, 23;
Bolles, Important English Statutes, p. 10, *Act concerning Wrecks of the Sea.*

§ 148. Of Title by Forfeiture.

Title by forfeiture is the title by which a person acquires an estate in personal property, as a legal consequence of some wrongful action or omission on the part of its former owner. By this title fines and penalties for crime, contraband merchandise and smuggled goods, and in some cases the implements of crime when taken from the criminal, vest in the government. Conditional estates in chattels may also be forfeited by breach of the condition, and in consequence the chattels then return, discharged of the conditional estate, into the possession of their original owner.

Rem. When a chattel is *loaned or rented* by its owner to another person for a particular purpose, or the chattel itself requires special care in its preservation or mode of use, the borrower or hirer holds it upon the implied condition that he will use it for no other purpose, and will devote to it the necessary care. On his violation of this condition his right to retain the chattel ceases, and the owner may at any moment reassume possession.

READ: 2 Bl. Com., pp. 420, 421;
2 Kent Com., Lect. xxxvii, pp. 385–387;
Dwight, Law of Persons and Property, pp. 555–557;
Clark, Elementary Law, § 228;
Smith, Personal Property, §§ 62–65.

§ 149. Of Title by Succession.

Title by succession is the title by which one person, by operation of law, acquires an estate in personal property formerly belonging to another, as his personal representative or successor. Personal property, upon the *death of its owner intestate*, does not descend to the heir like the real property, but vests first in an administrator, appointed by a court of probate, who collects

the assets of the decedent and pays his debts, and then delivers the surplus to those persons whom the law designates as the *successors or distributees.* These distributees may or may not be the same persons as the heirs of the realty, but while the title of the heirs takes effect at the death of the ancestor, that of the successors or distributees commences only when the distribution is made.

Rem. Title by succession is also the title by which the subsequent members of corporations aggregate, other than stock corporations, acquire their right to enjoy their corporate privileges as the original members disappear. The corporation itself never dies, but as vacancies occur and are filled by election or otherwise the new members *succeed* to the places and powers of the old. In stock corporations, however, where the rights of the members are mainly property rights, consisting in the right to dividends and the right to a share in the ultimate surplus of the corporate property, the title of new members arises from their acquisition of shares of stock by purchase or bequest, and is therefore a title by *contract* or by *testament,* though in one point of view it may be a title by succession also. The devolution of rights to the successive individuals who constitute a corporation sole is not the occasion of a new title, but a continuation of the rights in the same corporation by virtue of the title by which they were originally acquired.

READ: 2 Bl. Com., pp. 430–433, 515–520;
2 Kent Com., Lect. xxxvii, pp. 420–436;
Clark, Elementary Law, §§ 228, 231–235;
Darlington, Personal Property, pp. 331–339;
Smith, Personal Property, §§ 66, 67, 70.

§ 150. Of Title by Marriage.

Title by marriage is the title by which husbands and wives acquire estates in the personal property of one another as a legal consequence of their entrance into the marriage relation. Prior to recent statutes the entire personal estate of the wife was vested by the marriage in the husband. Her *choses in possession* became absolutely and immediately his. Her *choses in action* became his if reduced by him to possession, or in any other way converted by him to his separate use. Her *chattels real* he could dispose of at his pleasure, or they might be taken for his debts. The *rents and profits of her real estate* were also his, as well as all the avails of her personal skill and labor. The wife, on the

other hand, acquired no rights in the personal property of the husband during the coverture, except to those articles of clothing and ornament called *her paraphernalia,* which were purchased by him for her use. If he died intestate, during the coverture, she became entitled to succeed to a certain portion of his personal estate. In most of our States these rules have been considerably modified by statute.

Rem. Under the rules above stated the property advantages arising from a marriage accrued almost entirely to the husband. With the growing recognition of a wife as possessing some legal personality, distinct from her husband, there is a manifest tendency to treat both wife and husband as retaining in their own individual ownership all the personal property belonging to them at their marriage; to regard the husband as a mere trustee for the wife as to any of her chattels which may come under his control; and to consider such accumulations of their married lifetime, as may remain at the death of either, as a *quasi-community property* in which the survivor is entitled to a substantial share. How far these tendencies have been developed in any given State its local statutes will disclose.

READ: 2 Bl. Com., pp. 433–436, 515;
2 Kent Com., Lect. xxviii, pp. 273–284;
Clark, Elementary Law, § 228;
Darlington, Personal Property, pp. 340–356;
Smith, Personal Property, §§ 75–77.

§ 151. Of Title by Judicial Decree.

Title by judicial decree is the title by which a person acquires an estate in personal property as the direct result of the judgment of a competent court. The title of a victorious plaintiff to the *damages* awarded him *in an action of tort,* or to the *costs and penalties* in any action, is a title by judicial decree, since the right to these accrues to him by virtue of the judgment alone and not through any antecedent obligation or subsequent procedure. When the owner of *personal property,* which has been *unlawfully taken* and detained by another person, recovers compensation measured by the value of the property in an action against the wrongdoer, if the wrongdoer satisfies the judgment he thereby becomes the owner of the property as the direct result of the judgment and its satisfaction. Upon the *involuntary bankruptcy* of a tradesman his personal estate is

transferred to his assignee by the judicial action which decides that he is a bankrupt and appoints the assignee. The *administrator of a deceased intestate* becomes, for the time being, the owner of the personal property of the deceased through the decree of the court of probate under whose direction he settles the estate. A *guardian* designated by a court derives his title to the chattels of the ward from the action of the court by which he is appointed. The *title of a receiver* to the assets in his charge, or of a divorced woman to her *alimony*, are other instances of the same title.

Rem. Cases frequently arise where a prior title is rendered impregnable by judicial action, or where a new title is acquired as one of its indirect results. An example of the former is a title by a contract which can be enforced only by recovering judgment against the promisor; in which case, though the former obligation is merged in the judgment, no new property rights are thereby vested in the plaintiff, the judgment and its satisfaction serving merely to effectuate his original title. An instance of the latter appears in the sale of personal property upon an execution; where, though the execution sale is one of the consequences of the judgment, the title of the purchaser arises from the sale, and may be valid even if the judgment should be subsequently set aside. Such cases must be carefully distinguished from the true title by judicial decree, which is governed by rules of its own, may be more or less universal as to the persons whom it binds, and stands or falls with the validity of the judgment on which it rests.

READ: 2 Bl. Com., pp. 436–439, 485, 486;
2 Kent Com., Lect. xxxvii, pp. 387–389, 399;
Barbour, Rights of Persons and Property, pp. 663–665;
Dwight, Law of Persons and Property, pp. 560–581;
Walker, American Law, § 55;
Andrews, American Law, §§ 285–295;
Clark, Elementary Law, § 229;
Darlington, Personal Property, pp. 165–167;
Smith, Personal Property, §§ 68, 69, 71–74.

§ 152. Of Title by Occupancy.

Title by occupancy is the title whereby a person acquires an estate in personal property, of which he takes exclusive possession at a time when it legally belongs to no one. Thus animals *feræ naturæ*, roaming at large on public land or in public waters, may become the property of one who captures them.

So also the unconfined *forces of nature* may be appropriated by any person who can control them; and *chattels, abandoned* on the land by their real owner, may be devoted to his own use by the finder, unless by title by prerogative they are vested in the State.

Rem. A finder of *goods accidentally lost* or misplaced by their owner, and which he would reclaim if he discovered them, acquires no title to them; but on the contrary, if he assumes any control over them whatever, he incurs certain obligations toward them and their owner without any assurance of benefit to himself. He is obliged to *protect* the property and to take proper steps to *discover the owner* and restore it to him, as prescribed by local statutes; and failing these he is liable to be sued for conversion or prosecuted for theft. But having taken these steps he may lawfully retain the property till the owner appears; and should the owner never appear it will become practically though not legally the property of the finder.

READ: 2 Bl. Com., pp. 400–404;
2 Kent Com., Lect. xxxvi, pp. 355–360;
Barbour, Rights of Persons and Property, pp. 594–598;
Dwight, Law of Persons and Property, pp. 472–481;
Walker, American Law, § 179;
Clark, Elementary Law, § 227;
Darlington, Personal Property, pp. 35–38;
Brantly, Personal Property, §§ 123–149;
Smith, Personal Property, §§ 33–37;
2 Schouler, Personal Property, §§ 6–8, 14–16, 18–22, 26.

§ 153. Of Title by Accession.

Title by accession is the title by which the owner of existing personal property acquires an estate in such other personal property as is naturally or artificially produced by or added to his own. Thus the *progeny of animals* belong to the person who owned or had a definite leasehold interest in the mother when the progeny were born. *Materials* of one person innocently *incorporated into a structure* owned by another, who furnished the labor and the principal materials, become the property of the latter when inseparable from the structure, although he may be required to pay their value to their former owner. The *chattel* of one person, if *converted* by the skill of another into an *article of different species* or a higher nature, belongs to the converter if he acted in good faith, upon making

compensation to the owner. But one who *wrongfully* and knowingly *appropriates* to his own structures the materials of other persons, or expends his skill and labor upon their chattels gains no advantage, but rather loses what he has expended and may also be liable in a suit for damages for the conversion.

Rem. Whether or not an article or structure is that *principal thing*, which draws after it the ownership of property added thereto, depends not upon its size, its individual nature, or its pecuniary value; but rather upon its legal relation to the entire property as that which gives to it those essential characteristics which determine its identity. Thus the keel is the principal thing in a ship, the foundation in a house, the body and running gear in a wagon, the operating mechanism in a machine, the fitted fabric in a garment. The same rule applies as between the labor expended on an article and the original article itself; if the labor changes the identity the labor is the principal thing — otherwise not. Thus a picture painted on the canvas of another, the construction of an article of furniture out of the lumber of another or of a coat out of the cloth of another, changes the ownership of the canvas, the lumber, and the cloth; the picture, the furniture, and the coat being new articles of a higher nature, although the original materials may still be traceable in them.

READ: 2 Bl. Com., p. 404;
2 Kent Com., Lect. xxxvi, pp. 360–364;
Barbour, Rights of Persons and Property, pp. 600, 601;
Dwight, Law of Persons and Property, pp. 481–486;
Clark, Elementary Law, § 227;
Brantly, Personal Property, §§ 85, 86, 150–166;
Smith, Personal Property, §§ 38–41;
2 Schouler, Personal Property, §§ 26–41.

§ 154. Of Title by Confusion.

Title by confusion is the title by which the owner of one article of personal property acquires an estate in such other articles of personal property as by the wrongful act of their owner are indistinguishably commingled with his own. Chattels of the *same species* may be commingled by accident, by consent, or by the wrongful act of a third party; and in these cases the *mass will be divided* between the owners, either by severance of their particular chattels, or by allotting to each his proportionate share of the whole. But where the admixture has resulted from the wrongful act of one of the owners the loss, if any, must fall

on him. If the property can be separated, or proportionately divided, this must be done at his expense; if not, the entire mass belongs to the innocent owner without compensation to the other for the increase thus obtained.

Rem. From statements found in some authorities it might be inferred that any wrongful mixture of goods by one of the owners *ipso facto* forfeited his portion to the other. But the generally recognized doctrine requires that to produce this effect the goods commingled must be indistinguishable; and that when distinguishable the separation shall be made at the cost of the wrongdoer. Title by confusion does not arise where the mingled goods are of *different species*, like corn and coal, or scraps of brass and iron. Here the separation is possible and may be made by the owner at the expense of the wrongdoer, who is also liable in damages for the trespass or conversion.

READ: 2 Bl. Com., p. 405;
2 Kent Com., Lect. xxxvi, pp. 364, 365;
Barbour, Rights of Persons and Property, pp. 598–600;
Dwight, Law of Persons and Property, pp. 486. 487;
Brantly, Personal Property, §§ 167–175;
2 Schouler, Personal Property, §§ 42–53.

§ 155. Of Title by Creation.

Title by creation is the title by which a person acquires an estate in such personal property as derives its existence from his skill and labor. Any chattel which can be artificially produced may be held by this title. Two species of property, however, which result from the creative powers of man are of especial legal importance. These are Inventions and Literary Property. An *invention* is any new and useful art, machine, manufacture, composition of matter, or design, or any new and useful improvement on any art, machine, manufacture, composition of matter, or design, which has not been already known and used. The *essence of an invention* is the mental conception or idea which is embodied in the external art or article, and to this idea the right of property extends in whatever other external form it may be expressed. *Literary property* consists of the contents of books, maps, charts, prints, engravings, pieces of written music, and the like. The *essence of literary property* is not the idea or mental conception which the language or the images or the notes portray, but the words, lines,

colors, signs, and their arrangement in which the author or composer has presented his ideas. Both inventions and literary property belong solely to their creator until they are *voluntarily disclosed* to the public at large; then they become incapable of exclusive dominion and, like other abandoned chattels, are regarded as the common property of all mankind. For the encouragement of authors and inventors, and in order to enable them to reap some pecuniary profit from their labors, civilized nations usually confer upon them a *temporary monopoly* in their productions by prohibiting other persons to make, use, or sell them without their consent. The laws by which this monopoly is granted are known as the Patent and Copyright Laws.

Rem. In the United States the patent and copyright laws are enacted by Congress, and are in force in all the individual States and Territories. Similar laws may be prescribed by the individual States, but have no validity outside the area of the State, and are not usually available to authors and inventors who obtain monopolies under Acts of Congress. The Federal patent laws provide for the issue of letters patent to the inventor, bestowing upon him the exclusive right to make, use, and sell his invention for a definite term of years. The Federal copyright laws provide for the issue of a certificate to the author or composer, conferring upon him the exclusive right to print, publish, or sell his literary or musical production during a prescribed period. A similar protection is extended by courts of law and equity to *trade marks*, which are visible symbols affixed to commodities in order to indicate their origin or quality; and recent Federal statutes provide for their earlier and additional security through a system of public claim and registration.

READ: 2 Bl. Com., pp. 405–407;
2 Kent Com., Lect. xxxvi, pp. 365–384;
Barbour, Rights of Persons and Property, pp. 601–627;
Dwight, Law of Persons and Property, pp. 488–554;
Clark, Elementary Law, § 227;
Darlington, Personal Property, pp. 192–277;
Brantly, Personal Property, §§ 40–73, 93–96;
Smith, Personal Property, §§ 42–60;
1 Schouler, Personal Property, §§ 518–541.

§ 156. Of Title by Gift.

Title by gift is the title by which a person acquires an estate in personal property through its immediate, voluntary, and

gratuitous transfer to him by another. Gifts are of two kinds: (1) Gifts *inter vivos;* and (2) Gifts *causa mortis.* A *gift inter vivos* is an absolute gift from one living person to another, intended to take and actually taking immediate effect. A gift *causa mortis* is a conditional gift made by a person in his supposed last illness, to take effect if he then dies according to his expectation, but to be void if he recovers. To both these forms of gift the *delivery* of the property to the donee or to some person on his behalf is essential. If the property is a chose in possession actual delivery must be made, if possible. If actual delivery is impossible on account of the nature or situation of the property, some act equivalent to it must be performed by the donor, whereby he parts not only with the possession but with the ownership of the property. Where the property is a chose in action it must be transferred by an assignment, or by acts and declarations which have the same legal effect.

Rem. A gift *inter vivos* is *irrevocable* between the parties unless it was procured by fraud, or while the donor was legally incapable of making it. It can, however, be *set aside* when employed by the donor as a means of defrauding his creditors, or they may ignore the gift and levy their executions on the property itself. A gift *causa mortis* is always *revocable* by the donor before his death; when perfected by his death it becomes irrevocable, except for fraud.

READ: 2 Bl. Com., pp. 440–442, 514;
2 Kent Com., Lect. xxxviii, pp. 437–448;
Barbour, Rights of Persons and Property, pp. 627–632;
Walker, American Law, § 207;
Andrews, American Law, § 578;
Clark, Elementary Law, § 230;
Darlington, Personal Property, pp. 55–75;
Smith, Personal Property, §§ 78–89;
2 Schouler, Personal Property, §§ 54–198;
1 Parsons on Contracts, pp. 234–237;
3 Redfield on Wills, pp. 321–349.

§ 157. Of Title by Testament.

Title by testament is the title by which one person acquires an estate in personal property after the death of the former owner, and by virtue of his last will and testament. The rules governing the execution of a will of personal property, the requisites for its

validity, the mode of its interpretation, and the form of its probate are usually the same as those applied to a will of lands, though in some States certain differences are permissible under the local law. The property disposed of in a testament is called a *legacy;* and the person to whom it is given is known as a *legatee.* Legacies are of two kinds: (1) Specific Legacies; and (2) General Legacies. A *specific legacy* is a particular article, like a certain portrait, given by the testament to a particular individual. A *general legacy* is an amount of money, or a quantity of chattels, the donation of which will be satisfied by any money of the same amount or any chattels of the same character and measure. Legacies are always *conditional* upon the solvency of the decedent's estate, in its relation to both debts and legacies. The debts must at all events be paid in full; and in case of a deficiency, the general legacies are first drawn upon *pro rata,* and when these are exhausted the specific legacies may be also taken. *Legacies* are ordinarily *payable* one year after the death of the testator, and if the executor unreasonably withholds the payment he may be compelled to make it by the court. When a legatee dies during the lifetime of the testator, the *legacy is said to lapse,* and the property covered by it, unless otherwise provided in the will, sinks back into the intestate estate and passes to the legal representatives by title by succession.

Rem. In ancient times a will of personal property could be made by spoken words, and was called a *nuncupative will.* This is now permitted only in cases of great emergency, like a soldier in actual military service or a mariner at sea, and even then is carefully regulated by the law of the testator's domicile. An *olographic* will is one wholly written by the testator himself, on which account its language may sometimes receive a more liberal interpretation.

READ: 2 Bl. Com., pp. 489–504, 512–515;
4 Kent Com., Lect. lxviii, pp. 516–518;
Barbour, Rights of Persons and Property, pp. 646, 647;
Dwight, Law of Persons and Property, pp. 581–668;
Clark, Elementary Law, § 230;
Tiedeman, Real Property, §§ 879, 885;
Rice, Real Property, §§ 403, 404;
Darlington, Personal Property, pp. 315–330;
Smith, Personal Property, §§ 90–95, 130–133;

1 Schouler, Personal Property, §§ 561–563;
Page on Wills, §§ 738–746;
Croswell, Handbook on Executors and Administrators, §§ 147–162;
Ante, §§ 137–139.

§ 158. Of Title by Contract: Essentials of a Contract.

Title by contract is the title by which one person acquires an estate in personal property through its transfer to him by its former owner for a valuable consideration. A *contract* is an agreement between two or more persons upon a sufficient consideration. To it *four things are necessary:* (1) Parties able to contract; (2) A sufficient consideration; (3) A subject-matter concerning which the contract is made; (4) An actual contracting by proposal on one side and acceptance on the other. A contract between two persons only is called a *bipartite* contract; between three persons, each of whom thereby puts himself under a distinct obligation to both the others, is a *tripartite* contract; between four persons, similarly related, a *quadripartite contract.*

Rem. The *parties to a contract* may be any persons of normal status. Persons of abnormal status may or may not possess contracting power according to the character of the contract in question and the nature and degree of their own abnormality. Thus an *infant* can make no binding contract except for necessaries such as food, clothing, medical attendance, education, and the like; and even these contracts are invalid unless the articles contracted for were really necessary and have been actually supplied to him by the other party to the contract. *Insane persons,* unless already under legal guardianship, can enter into any contracts which they are at the time both able to comprehend and have sufficient will power to accept or reject. *Married women* may make agreements in reference to their sole and separate property, and under local statutes may enjoy a wider contractual capacity; if abandoned by their husbands they usually have all the powers of a *feme sole. Persons under duress* are not bound by contracts which, but for such duress, they would not have made. The *consideration of a contract* must possess pecuniary value. It may be time, money, service, chattels, land, or incorporeal rights; or even the surrender or suspension of a right having some real or prospective value. *Mutual promises* may be considerations for one another, and a *subsisting legal* duty is sufficient consideration for a promise to perform it. Every consideration, to be sufficient, must be *lawful;* for no one is per-

mitted to enforce a promise based on his own wrong. The *subject-matter of a contract* may be any corporeal object or any incorporeal right, or any act or forbearance which is both possible and lawful. A *matter intrinsically impossible* cannot be the subject of a valid contract, but any one may promise a possible thing though it may chance to be impossible to him. Where the subject-matter is *unlawful*, whether immoral or only prohibited by law, the contract is void. The *proposal and acceptance*, or meeting of the minds of the parties, exists only where all the parties understand both the consideration and the subject-matter in precisely the same way, and indicate to one another by unequivocal words or acts that they consent and bind themselves thereto.

READ: 2 Bl. Com., pp. 290–293, 442, 444–446;
Rob. Am. Jur., §§ 27, 28, 35, 42, 43, 45;
2 Kent Com., Lect. xxviii, pp. 150–170; Lect. xxxi, pp. 234–243; Lect. xxxix, pp. 450–453, 477;
Barbour, Rights of Persons and Property, pp. 632–638;
Walker, American Law, §§ 205, 206, 208–210;
Andrews, American Law, §§ 533–549, 551, 555–569;
Clark, Elementary Law, §§ 127, 130–134, 230;
Darlington, Personal Property, pp. 116–118, 131–138;
Langdell, Contracts, §§ 1–25, 45–98, 148–156, 178–187;
Wharton, Contracts, §§ 1–279, 296–624;
Anson, Contracts (Knowlton Ed.), pp. 1–42, 68–217;
Addison, Contracts (Abbott and Wood Ed.), pp. 1–19, 24–157, 1135–1172;
Metcalf, Contracts, pp. 15–119, 187–314;
Clark, Contracts (Tiffany Ed.), §§ 1–26, 61–192;
Benjamin, Contracts, pp. 7–71, 132–289, 382–384, 385–390;
Bishop, Contracts (Early Ed.), §§ 22–102, 312–334, 467–550, 637–744, 880–1164;
1 Parsons, Contracts, pp. 6, 7, 293–491;
2 Parsons, Contracts, pp. 672–675, 746–767;
Lawson, Contracts, §§ 1–32, 91–164, 206–350, 419–426.

§ 159. Of Title by Contract: Express and Implied Contracts.

An *express contract* is a contract in which the agreement between the parties is fully set forth in oral or written words. An *implied contract* is a contract in which the proposal and acceptance, not being set forth in words, are presumed by law from the conduct of the parties. Express and implied contracts are *of equal obligation*, but differ in their form and mode of proof and, to some extent, in the subjects-matter in reference to which they can be employed. In an express contract, where the proposal and acceptance are both manifested by words,

the *meaning of the words* in each must correspond exactly with their meaning in the other, or there will be no contract. In an implied contract the circumstances must be such that no conclusion, as to the meaning and intention of the parties, except the one implied by law is possible. When an *express contract* is *void* for want of correspondence in the proposal and acceptance, the law will sometimes imply from the conduct of the parties a contract in lieu of that which they had failed to properly express. An express contract becomes *complete and binding* when the verbal proposal of one party has been verbally and unconditionally accepted by the other. An implied contract becomes complete and binding when all the circumstances from which the law implies the contract have transpired.

Rem. A contract arises by implication of law whenever between parties able to contract, and in reference to a possible and lawful subject-matter, a valuable consideration moves from one to the other under circumstances which indicate that a proposal and acceptance was mutually, even if unconsciously, intended. The principal classes of implied contracts are these: (1) *Quantum meruit,* or the implied agreement of the employer to pay the employee what his services are reasonably worth; (2) *Quantum valebat,* or the implied agreement of a vendee to pay the vendor what the property sold is reasonably worth; (3) *Money had and received,* or the implied agreement of one who receives another's money, without giving valuable consideration for it, to pay it over to that other on demand; (4) *Money laid out and expended,* or the implied agreement of one person, for whom another at his request has expended his own money without receiving valuable consideration for it, to pay it to that other on demand; (5) *Money lent and advanced,* or the implied agreement of one person, to whom another has loaned money, to pay it to that other on demand; (6) *Account stated,* or the implied agreement of two merchants, who have adjusted their accounts with one another, that the balance due from either to the other shall be paid upon demand; (7) *Interest due,* or the implied agreement of a debtor to pay lawful interest on all sums of money which may be overdue; (8) *Use and occupation,* or the implied agreement of one person who occupies the land of another, without a lease fixing a stipulated rent, to pay the owner of the land whatever the use thereof may be reasonably worth; (9) *Fidelity and skill,* or the implied agreement of one person, who undertakes to perform any service for another, that he will discharge his duties with the requisite ability and

diligence, and the implied agreement of all contracting parties that fairness and honesty shall be observed between them. Besides the various classes of implied contracts there are *other transactions resembling contracts* in their parties, consideration, and subject-matter, but whose circumstances do not warrant the law in implying a proposal and acceptance, though reason and justice demand that one of the parties should make compensation to the other. These are called *quasi contracts*, among which are the following: (1) The imputed promise of a citizen to pay his taxes, or of a judgment debtor to satisfy the judgment, or of a defeated party in an arbitration to perform the award; (2) The imputed promise of parties who have attempted to make a valid contract, but have not succeeded and yet have acted as if a valid contract had been made, to carry out the terms of the agreement according to their original intention; (3) The imputed promise of one party to a contract, on whom the other contracting party has not conferred the full benefit which entitles him to compensation under the contract, to pay for whatever benefit he has received; (4) The imputed promise of a party, to whom without his request, or even without his knowledge, goods or money have been furnished or services rendered under circumstances which make it reasonable and just that he should pay for them, to remunerate the party at whose cost they have been supplied; (5) The imputed promise of a person, who has fraudulently or by coercion obtained money from another, to return it on demand; (6) The imputed promise of a person, who has wrongfully taken and sold the property of another, to account to the owner of the property and pay to him the price received at his request.

READ: 2 Bl. Com., p. 443;
3 Bl. Com., pp. 158–164;
Dwight, Law of Persons and Property, pp. 347–349;
Walker, American Law, § 214;
Clark, Elementary Law, §§ 134–138;
Darlington, Personal Property, pp. 113, 114;
Wharton, Contracts, §§ 707–721;
Anson, Contracts (Knowlton Ed.), pp. 362–367;
Addison, Contracts (Abbott and Wood Ed.), pp. 22–24, 1025–1051;
Metcalf, Contracts, pp. 1–15;
Keener, *Quasi* Contracts, pp. 3–25;
Clark, Contracts (Tiffany Ed.), §§ 5, 14, 15, 279–282;
Bishop, Contracts (Early Ed.), §§ 181–311;
1 Parsons, Contracts, pp. 4, 7, notes;
Lawson, Contracts, §§ 33–58.

§ 160. Of Title by Contract: Oral and Written Contracts.

An *express contract* may be either oral or written, and when written may be executed by signing with or without a seal. It may also be partly written and partly oral, but in this case the same provisions cannot be both oral and written, since the written supersedes the oral and cannot be contradicted nor restricted by it. A contract in writing and not under seal is called a "*simple contract,*" to distinguish it from a contract under seal which is known as a "*covenant*" or "*specialty.*" A specialty and a simple contract differ in several important particulars. In a specialty the seal raises the presumption of a sufficient consideration for the promise, while in a simple contract an actual consideration must be proved; the action at law on the breach of a specialty is covenant-broken, that on a simple contract is debt or assumpsit; the Statute of Limitations generally bars a suit upon a simple contract much earlier than one upon a specialty; and a specialty is of much higher force than a simple contract as an estoppel. Formerly, any contract might be written or oral at the option of the parties, but by the Statute 29 Chas. II. ch. 3 (A. D. 1677–78), commonly called the "*Statute of Frauds,*" certain contracts were required to be in writing. This Statute is substantially in force in all our American States.

Rem. The contracts which the Statute of Frauds requires to be in writing are usually *six:* (1) Contracts for the transfer of any interest in real property except by leases for short terms, whose duration varies in different States; (2) Contracts that cannot be performed within one year from their date; (3) Contracts of executors or administrators to pay a debt of the decedent out of their own estate; (4) Contracts to answer for the debt, default, or miscarriage of another; (5) Contracts made in consideration of marriage; (6) Contracts for the sale of chattels of above a designated value, unless the buyer accepts part of the goods sold or pays a portion of the purchase money. All these contracts could arise from mere words alone without any action or external fact to demonstrate their existence; and hence it was not difficult for fraud to be committed by employing a perjured witness to testify that the words necessary to the pretended contract had been spoken, while the alleged speaker, being a party to the controversy and therefore not allowed to testify, was unable to deny them. It was for the prevention of this mis-

chief that the Statute of Frauds was enacted; and hence it is considered rather as a *rule of evidence* than a part of the law of contract, and its protection may be waived by the defendant if he chooses. Hence, also, if the contract, though not in writing, is performed on one side to the acceptance of the other, the latter cannot repudiate its obligations; and courts of equity accept such a *part performance* of the contract as is sufficient to indicate its terms as equivalent to written evidence of its existence as against the person who has part performed. The *writing required* by the Statute is not a formal contract, but a memorandum which discloses the terms of the agreement and is signed by the persons to be charged thereby.

READ: 2 Bl. Com., pp. 465, 466;
3 Bl. Com., pp. 157, 158;
2 Kent Com., Lect. xxxix, pp. 510, 511;
Walker, American Law, §§ 211, 213;
Andrews, American Law, §§ 550, 552;
Clark, Elementary Law, §§ 128, 129;
Darlington, Personal Property, pp. 115, 116, 118–123, 126–131;
Wharton, Contracts, §§ 677–705;
Anson, Contracts (Knowlton Ed.), pp. 43–65;
Addison, Contracts (Abbott and Wood Ed.), pp. 19–22, 158–180;
Clark, Contracts (Tiffany Ed.), §§ 27–60;
Benjamin, Contracts, pp. 71–131, 384, 385;
Bishop, Contracts (Early Ed.), §§ 103–180, 335–364, 745–761, 1165–1176, 1228–1335;
1 Parsons, Contracts, pp. 7, 8;
3 Parsons, Contracts, pp. 3–60;
Lawson, Contracts, §§ 59–90;
Bolles, Important English Statutes, p. 94, *Statute of Frauds, Act 29 Chas. II*, c. 3.

§ 161. Of Title by Contract: Construction and Validity of Contracts.

A *contract is construed* according to the intent of the parties as manifested by the words, acts, or relations in which the agreement is expressed or from which it is implied. It is also interpreted in the light of all existing laws and usages pertaining to the subject-matter of the contract, and with regard to all its necessary incidental rights unless these are expressly excluded by its terms. The *words of a contract* are taken in their legal meaning, if they have one; if not, then in their customary use, or in the sense indicated by the actions of the parties in pursuance of the contract, and by their subsequent agreements in reference to the nature and performance of their obligations.

Should it happen that a contract interpreted by the foregoing rules does not express the intent of any of the parties, they may by mutual consent *rescind* it and make another in its stead; or if this be impracticable a court of equity may upon their petition amend it to conform to their intent. But neither of the parties has a right, as against the others, to repudiate the contract or to have it amended on the ground that it does not express the agreement as he understood it, unless his consent to it was procured by fraud.

Rem. The law which governs the interpretation as well as the validity of a contract is primarily the *lex loci contractus*, unless the contract relates to real property; in which case it must conform to the *lex rei sitæ*. Where a contract made in one State is to be performed in another the *lex loci solutionis* controls it, at least as to the matter of its performance. The parties may also adopt the law of any State as the *lex loci pacti*, and will then be governed by it unless the policy of the State where the contract was made or is to be performed forbids. A contract good in part under these laws but void as to the rest, may, if *divisible*, be sustained as to the valid portion while the remainder is ignored. Where a contract is made the basis of a suit, the proceedings in the action, and the character of the remedy, are regulated by the *lex fori*.

READ: 2 Kent Com., Lect. xxix, pp. 453–463;
Clark, Elementary Law, § 135;
Brantly, Personal Property, §§ 288–369;
Langdell, Contracts, §§ 20–44, 105–147;
Wharton, Contracts, §§ 545–674, 1061–1071;
Anson, Contracts (Knowlton Ed.), pp. 237–270;
Addison, Contracts (Abbott and Wood Ed.), pp. 181–208;
Metcalf, Contracts, pp. 315–365;
Clark, Contracts (Tiffany Ed.), §§ 209–223;
Benjamin, Contracts, pp. 290–311, 390, 391;
Bishop, Contracts (Early Ed.), §§ 365–466, 550–576, 1336–1349, 1368–1412;
2 Parsons, Contracts, pp. 491–613;
Lawson, Contracts, §§ 369–389.

§ 162. Of Title by Contract: Performance of Contracts.

When a contract has once been legally made between the parties the law requires of them the *precise fulfilment* of all its obligations according to their terms, unless before the time fixed for such fulfilment the contract itself has been extinguished

either by their mutual consent or by operation of law. A contract which has been thus fulfilled is called an *executed contract;* a contract not fulfilled is known as an *executory contract.* A contract in which the consideration is received at the time of the agreement, leaving only the promise of one party unperformed, is a *unilateral contract;* one made in consideration of mutual promises is, at the time of its inception, a *bilateral* or *trilateral contract* according to the number of its parties, and becomes bilateral or unilateral as the successive promises are fulfilled. In a *unilateral* contract the obligation of the promissor to perform is absolute. In a *bilateral* contract, if the promise upon one side is made conditional upon the previous performance of the promise on the other, no duty to perform the conditional promise arises until the previous promise is redeemed. Where the performance of the previous promise requires the co-operation of the party to whom that promise is made, it is sufficient for the previous promisor to perform as far as he is able, and then *tender* or offer to perform the residue with the required co-operation of the promisee; if the tender is accepted, the performance must then be completed according to the contract; if the tender is refused the previous promisor is absolved from further duties and the promisee becomes liable in damages. Thus in a contract to sell goods for a price payable on delivery the buyer is not liable for the price until the goods are delivered, but if the seller offers and the buyer refuses to accept them, the duty of the seller is at an end and the buyer is obliged to compensate him for his loss. An apparently single contract is sometimes a mere aggregation of *divisible and independent contracts;* in which case each member of the aggregation stands alone, both as to the duty of performance and the consequences of a failure to perform. The *non-performance of a contract is excused* when performance is rendered impossible by the act of God, or of the public enemy, or of the other contracting party, or is forbidden by laws enacted since the contract was made, or when the right to performance is merged in other rights, or is waived or released by later contracts.

Rem. The rights accruing under a contract may be extinguished, before the time fixed for its performance, by a *release* given by the promisee to the promisor, or by the *joint rescis-*

sion of the contract as a whole, or by the making of a *new contract* which supersedes the old. An express contract which the law requires to be in writing cannot be released, rescinded, or superseded by mere words unless these are also in writing; but acts of the parties manifesting an intention on both sides to repudiate the contract, and placing the parties in such relations to each other that the contract cannot be performed, nor its non-performance justly be regarded as a ground for legal compensation, puts an end to the contract as a practical obligation; and if the rights created by it are not extinguished the parties are at least estopped from attempting to enforce them. A contract is also extinguished by a *judgment* in favor of the promisee in an action for non-performance, — the contract being *merged* in the judgment which thenceforth becomes the basis of all claims against the promisor.

READ: 2 Bl. Com., p. 443;
2 Kent Com., Lect. xxxix, p. 450;
Walker, American Law, §§ 205, 213;
Andrews, American Law, §§ 553–571;
Clark, Elementary Law, § 136;
Langdell, Contracts, §§ 157–177;
Wharton, Contracts, §§ 282–293, 869–918, 1031–1042;
Anson, Contracts (Knowlton Ed.), pp. 271–328;
Addison, Contracts (Abbott and Wood Ed.), pp. 1100–1134, 1173–1267;
Metcalf, Contracts, pp. 366–393;
Clark, Contracts (Tiffany Ed.), §§ 224–265;
Benjamin, Contracts, pp. 312–381, 391–395;
Bishop, Contracts (Early Ed.), §§ 577–622, 623–636, 762–879, 1350–1367, 1413–1461;
2 Parsons, Contracts, pp. 636–733;
Lawson, Contracts, §§ 390–455.

§ 163. Of Title by Contract: Contracts of Sale.

Contracts enter into almost every species of human transactions whether relating to personal, property, or family rights. Those pertaining to personal property are (1) Contracts of Sale; (2) Contracts of Bailment; (3) Contracts of Service; (4) Contracts of Partnership; (5) Contracts of Insurance; (6) Contracts of Debt; (7) Contracts of Indorsement; (8) Contracts of Guaranty and Suretyship. A *contract of sale* is a contract by which the ownership of some specific existing chattel is immediately transferred from one person to another, in consideration of some specific price or recompense in value. This contract must be carefully distinguished from a *contract*

to sell, which passes no present property but speaks only of the future, and may be one form of a contract of service. A contract of *sale operates* only upon property now actually existing, or potentially existing as the natural and probable product of property which does actually exist, like the young of living animals, or as the immediate and certain result of a right now residing in the vendor. The *price* must be definite, or immediately ascertainable by reference to some known standard, like a market quotation; and unless credit is allowed is payable on delivery of the goods. To complete the sale a *delivery* of the property into the exclusive control of the buyer is necessary. Delivery may be actual or constructive; *actual*, when the goods are placed within the manual possession of the buyer; *constructive*, when the seller has done all he has to do in order to separate the goods sold from other goods, and to bring them under the power of the buyer, as by marking them with his name, giving him the key of the place where they are kept or a written order for them on the person in whose custody they now are. The *retention of possession* by a seller after a pretended sale is a badge of fraud and, unless legally justifiable under the circumstances, renders the goods still subject to the claims of his creditors or *bona fida* purchasers as against the buyers, even though they may have paid the price. The sale of incorporeal personal property or of a chose in action is usually called an *assignment*, and being effected only by words admits of no actual delivery. But the evidence of the intention to assign, and of some formal assignment, must be clear; and in some cases must be evidenced by writings; and *notice* of the sale must be given to the party against whom the property right is to be enforced, or he will not be bound by the assignment. The contract of sale includes all those agreements by which property is bought and sold, or bartered and exchanged, or loaned to be consumed and afterward replaced by other goods of the same kind or value, or to be manufactured by the vendor under such conditions as to become from their inception the property of the vendee.

Rem. Coupled with contracts of sale are frequently *contracts of warranty*, either express or implied. The sale of goods now in the possession of the vendor to an innocent *bona fide* purchaser

carries with it an *implied warranty of title;* but one who buys of a vendor not in possession runs his own risk of the vendor's right to sell. There is *no implied warranty of quality* from the mere fact of sale; but one who sells by *sample* warrants that the residue of the goods correspond with the sample, and one who sells goods as suitable for use in a particular manner or for a particular purpose warrants their suitability for that use. An *express warranty* is a formal stipulation on the part of the vendor concerning the goods sold or the title thereto. Such a warranty does not guarantee the vendee against patent defects of which he has knowledge; and if he desires to avail himself of the warranty he must do so as soon as he discovers the defect, either by returning the goods to the vendor or by notifying him to remove them. A vendor who sells without warranty is not obliged to *disclose secret* defects, but if he conceals them by artifice or falsehood he is guilty of a *fraud* that invalidates the sale. A buyer cannot *in part affirm* and in part *repudiate* a sale for any cause, unless the transaction is a divisible aggregation of several sales; then some parts of the transaction may be binding while the others are void.

READ: 2 Bl. Com., pp. 446–451;
2 Kent Com., Lect. xxxix, pp. 468–552;
Barbour, Rights of Persons and Property, pp. 639–646;
Walker, American Law, §§ 225–229;
Andrews, American Law, § 576;
Clark, Elementary Law, § 139;
Darlington, Personal Property, pp. 75–100;
Smith, Personal Property, §§ 96–114;
Addison, Contracts (Abbott and Wood Ed.), pp. 915–1004;
1 Parsons, Contracts, pp. 223–233, 519–609;
Lawson, Contracts, §§ 57, 351–368.

§ 164. Of Title by Contract: Contracts of Bailment.

A *contract of bailment* is a contract by which the possession of some specific existing chattel is transferred from one person to another, *in trust,* upon the consideration that the trust shall be fulfilled, and that upon its fulfilment the chattel shall be returned to its owner. Of this contract there are *five forms:* (1) Depositum: (2) Mandatum; (3) Commodatum; (4) Pignus; (5) Locatio. *Depositum* is the bailment of a chattel to be kept by the bailee for the bailor without recompense, and to be returned to the bailor on demand. *Mandatum* is the bailment of a chattel to a person who undertakes, without recompense, to render to the bailor some actual service in respect to

the thing bailed. *Commodatum* is the bailment of a chattel to be used by the bailee without paying for its use. *Pignus* is the bailment of a chattel by a debtor to his creditor to secure the payment of the debt. *Locatio* is the bailment of a chattel to one who is to use it and pay for its use, or who is to expend money or labor upon it and be recompensed therefor. Locatio is of three kinds: (1) *Locatio Rei,* in which the bailee hires the property to use for his own benefit, and agrees to pay a stipulated or customary rent; (2) *Locatio Operis Faciendi,* in which the bailee receives the property under an agreement to repair it or improve it, or safely keep it, and the bailor agrees to pay him a stipulated or reasonable price; (3) *Locatio Operis Mercium Vehendarum,* in which the bailee undertakes to receive the property and transport it from one place to another upon the payment of a customary or stipulated rate. A bailee of this latter class is called a *carrier,* and may be either a private carrier or a common carrier. A *private carrier* is one employed on a particular occasion, and not engaged in the general business of public transportation. A *common carrier* is one whose regular occupation it is to transport property for all persons indifferently, with or without a special agreement in reference to the price. He is *obliged* to carry all goods that are offered to him which he has the ability to transport, and is answerable for all losses which do not occur from the act of God or of the public enemy or of the owner of the property; and in the absence of a stipulated rate he is entitled to the customary or a reasonable compensation. The general rights and liabilities, existing between bailors and bailees, arise by implication of law from the transfer of the property for the purposes of the bailment. These may be varied by an express agreement to suit the intention of the parties, provided it does not relieve them from responsibilities which a sound public policy requires them to fulfil.

Rem. In every case of bailment two estates may be predicated of the chattel bailed; one, the estate of the owner; the other, the estate of the bailee. The *estate of the bailee* always includes the right of possession, and may be terminable at the will of the bailee, or by the completion of the trust, or by lapse of a prescribed duration. Such estate is called the "*qualified estate,*" or "*special property*" of the bailee. The *estate of the*

owner does not include the right of possession, but comprises the right of ownership, the right to the fulfilment of the trust by the bailee, and the right to resume possession of the chattel when the trust is completed or when the bailee forfeits his possession by a breach of trust. The *principal duties* subsisting between the parties pending the bailment are: on the part of the bailor, to allow the bailee to retain peaceable possession until the trust is fulfilled, and to pay the recompense, if any, provided by the contract; on the part of the bailee, to devote to the chattel such care and labor as the contract stipulates or the trust implies. The *degree of care*, required by law of the bailee, differs according to the nature of the bailment. In a *depositum* he must take the same care of the chattel that he does of his own similar property, and is liable only for such neglect as a man of ordinary prudence would avoid, or for breach of faith, or for want of the skill which he has undertaken to exercise, or for the use of the chattel otherwise than for its own protection and benefit. In a *mandatum* he is liable only for grave neglect, or breach of faith, or lack of skill for the service, or unreasonable use. In a *commodatum* he must exercise the greatest care, and is responsible for the slightest negligence, and for any use of the chattel which is not covered by the contract. In *pignus* he must take such care of the chattel as prudent men take of their own property, and is liable for ordinary neglect, or for the use of the chattel for his own benefit, or for selling it to pay the debt without due notice to the bailor. In *locatio* he must exercise ordinary care in protecting the chattel, and must subject it only to the stipulated use, repair, improvement, custody, or transportation. In the case of *innkeepers* and *common carriers* extraordinary diligence is required by law. The former are liable for all losses which do not result from inevitable accident, or the violence of the public enemy, or the acts of the bailor or his servants. The latter are responsible even for inevitable accident unless it is occasioned by the act of God.

READ: 2 Bl. Com., pp. 451–453;
2 Kent Com., Lect. xl, pp. 558–611;
Walker, American Law, §§ 161–168, 230–243;
Andrews, American Law, §§ 577, 579;
Clark, Elementary Law, § 140;
Darlington, Personal Property, pp. 38–54;
Brantly, Personal Property, §§ 227–236;
Smith, Personal Property, §§ 143–153;
Addison, Contracts (Abbott and Wood Ed.), pp. 355–434, 482–590;
2 Parsons, Contracts, pp. 86–257 *w*.

§ 165. Of Title by Contract: Contracts of Service.

A *contract of service* is a contract by which one person acquires a title to the time, energies, or skill of another. The various species of this contract may be grouped into *four classes:* (1) Contracts for occasional services, creating no relation between the employer and third persons. To this class belong such agreements as those between physician and patient, passenger and carrier, and all others where the stipulated service terminates upon the person or property of the employer, and creates no liability on his part toward third persons for the acts or omissions of the employee. In these contracts the employee is bound to use such diligence, fidelity, and skill as the nature of the employment requires; the employer is bound to pay the wages fixed by agreement or custom. (2) Contracts for services more or less permanent, and giving rise to certain incidental relations between the employer and third persons. This class includes those contracts which place the employee under the directive authority of the employer during the performance of the service. In these contracts the employer is bound to provide suitable appliances and safeguards according to the hazards of the service; use due care in selecting other employees upon whose prudence the safety of their fellows may depend; permit the rendition of the service by the employee; and pay the customary or stipulated wages. The employee must exercise proper diligence, fidelity and skill; and must run his own risk of the ordinary perils of the service, of secretly defective apparatus, and of the negligence of fellow servants engaged in the same general line of duty as himself. The employer is also liable to third persons for all injury caused by the wrongful actions or omissions of his employees while engaged in the transaction of his business. (3) Contracts whose main purpose and effect are to make the employee an intermediary between the employer and third persons. This class of contracts creates the relation known as *agency,* and renders the agent the representative of his principal in reference to all dealings with third parties within the scope of the authority conferred upon him by the contract. As between the principal and agent the reciprocal rights and duties are the same as between employer and employee in the second class of con-

tracts. As between the principal and third parties the principal is bound by all acts of the agent which from the nature of his employment, or the conduct of the principal, such parties could reasonably infer that the agent had authority to perform, whatever secret instructions to the contrary the agent may have received. An agent may be a *universal agent,* empowered to transact all the business of his principal of every kind; or a *general agent,* entrusted with all the business of a particular kind or at a particular place; or a *special agent,* appointed only for a particular transaction. It is the duty of all persons, before entering into relations with a principal through an agent, to ascertain from the principal himself, directly or indirectly, the existence and extent of the agent's authority, and having done this the principal will be bound by all acts of the agent within that authority. These rules apply to all species of agents; to some species such as brokers, factors, auctioneers, attorneys in fact and attorneys at law the law attaches additional rights and obligations. (4) Contracts for such services as require the employee to become a member of the family of the employer, and therefore establish the true relation of *master and servant,* which is governed by the Law of Family Rights.

Rem. A *broker* is an agent employed to sell or lease property to third parties on behalf of his principal. Ordinarily, the property is not placed in his possession. He must faithfully follow the instructions of his principal, and is liable for any negligence, want of punctuality, breach of orders, or fraud. His commission becomes due when he finds a customer able and willing to comply with the offer of the principal, whether or not the principal adheres to his offer and completes the contract. A *factor* is an agent employed to sell merchandise to third parties on behalf of his principal. Usually, the goods are left with him for sale. He also is bound to fidelity and diligence, and is entitled to his commission when a valid contract for the sale of the property has been made. If the goods are in his possession he has a lien upon them for his commission and expenses. An *auctioneer* is an agent employed to sell the property of another person to the highest bidder. He is liable to the vendor for any negligence in the discharge of his duty, and for any credit he may give to the vendee. If he does not disclose the name of his vendor he is liable to the vendee as if he were himself the vendor. He has a right to a commission for his services, and also a lien

upon the property to secure its payment. An *attorney in fact* is an agent employed to transact some special business, not only on behalf of, but *in the name* of, his principal. If appointed in writing the document is called a *power of attorney*, and must be under seal if he is to execute a covenant or deed. It is his duty to obey instructions, proceed with diligence and skill, and render an account of the business to the principal when it is completed. An *attorney at law* is a sworn officer of a court of justice who is employed by a party in a suit to manage his cause for him. His authority extends to all matters necessary to the progress and determination of the suit, but he cannot release nor compromise the claim without his client's consent. It is his duty to be true both to the court and his client; to manage the cause with care, skill, and integrity; to preserve the secrets of his client; and to keep him informed of the state of the litigation. He has a right to reasonable compensation for his services, and generally a lien upon the papers in his hands as well as on the judgment and costs which he obtains. As an officer of the court he is always subject to its orders, and may be disbarred for breach of duty toward the client or the court.

READ: 3 Bl. Com., pp. 25–29;
2 Kent Com., Lect. xxxii, pp. 258–261; Lect. xxxix, pp. 536–540; Lect. xli, pp. 612–647;
Barbour, Rights of Persons and Property, pp. 248–269;
Dwight, Law of Persons and Property, pp. 323–346;
Walker, American Law, §§ 116–124;
Andrews, American Law, §§ 573, 575;
Clark, Elementary Law, §§ 144–151, 169–175;
Anson, Contracts (Knowlton Ed.), pp. 329–361;
Addison, Contracts (Abbott and Wood Ed.), pp. 434–481;
Metcalf, Contracts, pp. 120–130;
Clark, Contracts (Tiffany Ed.), §§ 266–278;
1 Parsons, Contracts, pp. 39–118;
2 Parsons, Contracts, pp. 32–59;
Lawson, Contracts, §§ 165–204.

§ 166. Of Title by Contract: Contracts of Partnership.

A *contract of partnership* is a contract by which two or more persons unite their property or labor or both in some lawful business, and agree to divide the profits and share the losses of their common enterprise in certain proportions. It is essential to this contract that the *risks and losses be apportionable* as well as the profits. An agreement for services to be compensated for by a share of the profits, or for a loan to be paid only in case the enterprise succeeds, does not constitute a partnership

A partnership *contract may be oral or in writing,* and may prescribe in detail the reciprocal rights and duties of the partners, or may leave them to be determined by implication of law from the nature and usages of the business. In the absence of particular stipulations *each partner acquires* an interest, jointly with the others, in all the partnership assets; becomes responsible for all the partnership debts; and is empowered to bind the other partners by his acts in any transaction relating to the partnership. By this contract the partners are bound as between themselves. But as between the partnership or its members and *third parties,* the contract and its obligations are what the partners by words or conduct hold them out to be in their dealings with third parties, unless such parties are already acquainted with the provisions of the contract itself. Thus if a person, who is not a member of the firm, represents himself to be a partner, or acts as such, he is liable to third persons who rely upon his representations as if he were an actual partner; and if the other partners openly endorse or silently acquiesce in his representations his acts become binding also upon them. A partnership may be *dissolved* by its own limitation, or by mutual consent, or by the death or withdrawal of one of its members, or by their bankruptcy or that of the firm, or by a decree of a court of equity for causes which render its continuance unreasonable or unjust. Upon its dissolution the partners are entitled to their *pro rata* share of the assets remaining after the debts are paid. To guard against liability to third persons, for subsequent transactions in the partnership name, notice of the dissolution should be given to the public at large and to all persons who have had dealings with the partnership during its continuance. The same precaution must be taken by a retiring partner to protect himself against partnership debts incurred after his retirement.

Rem. The principal inconveniences attending a partnership enterprise arise out of its liability to dissolution by the death or withdrawal of a member, and out of the responsibility of each one of the partners for all the partnership debts. To avoid the former difficulty a partnership often, in modern times, assumes the form of a *joint-stock company;* in which the capital is divided into equal shares, a certain number of which are held by each

partner and are transferable by him at pleasure, thus substituting another partner for himself. In many respects these companies resemble corporations, — having a perpetual existence, acting through appointed officers, and known by a common name; but their members are still liable individually for all the partnership obligations. In many States these companies are organized under local statutes which clothe them with ordinary corporate powers and immunities. The latter difficulty is met by organizing the firm as a *limited partnership*. This organization is composed of one or more general partners whose liability for the partnership debts is unlimited, and of one or more special partners who contribute sums to the common stock, and whose responsibility does not extend beyond the amount contributed. These partnerships are created under local statutes which require such public notice of their formation, and internal relations, as will secure possible creditors against false impressions as to the financial condition and liability of the members of the firm.

READ: 3 Kent Com., Lect. xliii, pp. 23–69;
Walker, American Law, §§ 96–101;
Andrews, American Law, § 574;
Clark, Elementary Law, § 236;
Addison, Contracts (Abbott and Wood Ed.), pp. 792–804;
Metcalf, Contracts, pp. 131–160;
1 Parsons, Contracts, pp. 144–216;
Ante, § 23.

§ 167. Of Title by Contract: Contracts of Insurance.

A *contract of insurance* is a contract by which one person undertakes to pay to another person a sum of money upon the happening of a future contingent event. These contracts are of two classes: (1) Contracts to indemnify for a future contingent loss; (2) Contracts to pay a definite sum of money upon the happening of a future event which is either contingent in itself or contingent as to the time of its occurrence. To the first class belong contracts of *marine insurance* which provide for an indemnity in case of the loss or damage of a ship, freight, or cargo from the perils of the sea; contracts of *fire insurance* which provide for an indemnity in case of the loss or injury of property of any kind from fire; and some forms of the contract of *accident insurance* which provide for an indemnity in case of loss or damage to person or property from various fortuitous calamities. In these contracts of insurance the *indemnity is measured* by the actual amount of the pecuniary loss,

not exceeding the maximum amount named in the contract. To the second class belong contracts of *life insurance* which provide for the payment of a definite sum of money upon the death of a particular person, or upon a given date if the person should until then survive; and those contracts of *accident insurance* which stipulate for the payment of a definite sum in case the accident occurs. The contract of insurance is ordinarily in writing and is called a *policy of insurance;* the consideration paid by the insured is called the *premium.* Any *fraud or concealment* by the insured as to the nature of the risk assumed by the insurer avoids the contract, and any failure of the insured to observe its numerous special stipulations forfeits his right to avail himself of its provisions.

Rem. An insurance contract is in its nature a *wagering* contract, being in effect a bet that the event will or will not occur. Such contracts are generally void, but certain species of them, on account of their practical utility, are now regarded as legitimate. That which distinguishes contracts of insurance from unlawful wagering contracts is the fact that in them the condition for the payment is not merely the occurrence of a future contingent event, but the infliction by its occurrence of a loss upon the person insured, which loss the insurer undertakes in whole or in part to bear. Hence the insured must have an insurable interest in the person or property which forms the subject of the contingent loss. An *insurable interest* is a pecuniary interest which may be prejudicially affected if the loss occurs. An owner, bailee, lessee, lienor, trustee, or agent has an insurable interest in property. Every person has an insurable interest in his own life, health, and safety, and in those of other persons upon whom he has a legal claim, present or prospective, for support, or for services, or for the payment of money.

READ: 2 Bl. Com., pp. 458–461;
3 Kent Com., Lect. xlviii, pp. 253–352; Lect. l, pp. 365–376;
Walker, American Law, §§ 247–251;
Andrews, American Law, § 580;
Clark, Elementary Law, § 143;
Darlington, Personal Property, pp. 168–171;
Smith, Personal Property, §§ 121–129;
Addison, Contracts (Abbott and Wood Ed.), pp. 674–750;
2 Parsons, Contracts, pp. 350–488.

§ 168. Of Title by Contract: Contracts of Debt.

A *contract of debt* is a contract by which one person undertakes to pay to another a specific or definitely ascertainable sum of money. This contract *may arise* out of other contracts, as where goods are sold and delivered and the price has become due; or it may be independent of other contracts, as where money is loaned to be repaid by the borrower. It may *take the form* of an express contract under seal, as in a covenant to pay rent; or of a simple written contract, as in a promissory note; or of a parol contract, as in an agreement to pay a certain reward for lost articles; or of an implied contract, as where services of a fixed value have been rendered and accepted; or of a *quasi* contract, as where a judgment for damages has been given and remains unsatisfied. The *essence* of the contract, in these and all other cases of debt, is the agreement to pay the money when it becomes due. A contract of debt, unlike many other contracts, is *assignable* by the creditor without the consent of the debtor, and the assignee may proceed to collect the money by a suit in his own name in a court of equity, or by an action at law in the name of the original creditor, or in some States by an action in his own name. *Notice of the assignment* should be given to the debtor, since if without notice he pays the money to the original creditor in good faith the debt will be discharged. The assignee takes the debt subject to all the defences which the debtor might have set up against the assignor, and has no claim against the assignor in case the debt proves uncollectible unless under some additional contract of indemnity collateral to the assignment. A single exception to this rule exists ir reference to negotiable bills and notes, when assigned by a contract of indorsement.

Rem. The obligation created by a contract of debt is discharged either by the actual payment of the money at the proper time, or by the tender of the money to the creditor at the proper time and place and his refusal to accept it. A *tender* consists in the unconditional offer to the creditor by the debtor of the precise amount of the debt, in good and lawful currency, in such a manner as to bring the money within the immediate physical control of the creditor should he choose to receive it. The tender once made must be kept in force by the constant readiness of the debtor to make good the offer, or it will lose its legal

efficacy. A *payment* made by a debtor to a creditor to whom he owes several debts may be *appropriated* by the debtor to any debts or parts of debts he pleases by giving notice to the creditor to that effect; otherwise, the creditor may apply the payment as he deems best. *Payment by check or note* does not discharge the original indebtedness until the note or check is paid, unless by virtue of some special agreement or some provision of the local law. *Interest*, when not a part of the original debt, is allowed upon a debt past due as damages for the delay in payment, and its amount is generally fixed by law. Interest agreed upon between the parties, in excess of the legal rate, is *usury*, and any contract or device by which a creditor endeavors to secure it is void in law, and is visited with penalties differing according to local statutes.

READ: 2 Bl. Com., pp. 454–466;
3 Bl. Com., pp. 303, 304, notes;
Walker, American Law, § 212;
Andrews, American Law, § 572;
Darlington, Real Property, pp. 139–150, 155–164;
Brantly, Personal Property, §§ 265–287;
Smith, Personal Property, §§ 141, 142;
Langdell, Contracts, §§ 99–103, 130–133;
Wharton, Contracts, §§ 852–865, 923–995;
Anson, Contracts (Knowlton Ed.), pp. 218–236;
Addison, Contracts (Abbott and Wood Ed.), pp. 1268–1320;
Clark, Contracts (Tiffany Ed.), §§ 193–201;
Bishop, Contracts (Early Ed.), §§ 1177–1199;
1 Parsons, Contracts, pp. 217–233;
2 Parsons, Contracts, pp. 614–646;
3 Parsons, Contracts, pp. 102–153;
Lawson, Contracts, §§ 351–367, 410–418.

§ 169. Of Title by Contract: Contracts of Indorsement.

A *contract of indorsement* is a contract by which the holder of a negotiable promissory note or bill of exchange agrees with another person, to whom he at the same time assigns the debt evidenced by the bill or note, that he will himself pay that debt to the assignee or his assigns in case the prior parties to the note or bill fail to pay it when it becomes due. A *promissory note* is an unconditional written promise to pay a definite sum of money to a definite person at a definite future time. When made payable to the payee only it is a *non-negotiable* note; when made payable to the payee or his order or to bearer it is a *negotiable* note. A negotiable note is *good against the maker* in the hands of any *bona fide* holder who took it for a valuable

consideration, before its maturity and in the ordinary course of business, whatever defences may be available to the maker as between himself and the original payee. A negotiable note made payable to the payee or bearer is assignable by mere delivery; one made payable to the payee or order must be transferred by indorsement and delivery. *Indorsement* consists in the writing by the payee of his own name across the back of the note, with or without words designating the person to whom the note is thereby assigned. From this indorsement, unless qualified by further written words, the law implies a contract on the part of the indorser in favor of all subsequent holders of the note who take it in good faith in the ordinary course of business, before maturity, and for valuable consideration, that the note shall be paid at maturity according to its terms, provided the requisite demand and protest be made and proper notices be given by the person who shall at that time be its holder. Every successive indorser enters into the same contract with all subsequent *bona fide* holders. When an indorsed note matures it is the duty of the holder to *present it for payment* at the place contemplated by the parties, and if not then paid to have the note at once *protested* by a notary, and formal notices of the default of payment served with reasonable diligence upon all the indorsers to whom he intends to look for payment. Indorsers not thus notified are released from further liability to him. So far as the contract of indorsement is concerned, the same rules apply to a bill of exchange. A *bill of exchange* is an open letter of request from one person to another, desiring him to pay a certain sum of money at a certain time to a certain third person, and charge the amount paid to the person by whom the bill is drawn. It is the duty of the third person, or *payee*, to present the bill to the second person, or *drawee*, within a reasonable time; and of the drawee, if he intends to pay it at maturity, to write on it his *acceptance;* after which its legal effect as between the drawee and payee is that of a promissory note. Should the drawee refuse to accept the bill, the payee must protest it for non-acceptance and give the proper notice to the drawer and other prior parties. If a bill of exchange is made payable to order or bearer it will be negotiable and can be transferred by

delivery or by indorsement and delivery; the liabilities thereby created being the same as in the case of promissory notes.

Rem. The term *indorsement* is used in law, in a general sense, to denote any thing written on the back of a document, such as the return of a sheriff upon the back of his writ, the written finding of a grand jury upon the back of an indictment, etc. Its technical meaning, always supposed to be intended unless contraindicated either by the nature of the document or by the context, is the one given in the definition of the contract of indorsement, and comprises both an assignment and a guaranty. As such it is predicable only of negotiable paper, including bills of exchange and promissory notes made payable to bearer or order, and in some cases also embracing checks, certificates of deposit, bills of lading, corporate bonds, and even certificates of stock. The *indorsement of a non-negotiable* instrument may operate as an assignment only, not as a guaranty; and the assignee will take it subject to all the defences existing between the original parties. The *indorsement of a negotiable instrument* is restricted to a mere assignment by including the words "without recourse," or otherwise stipulating that no liability shall attach to the indorser. The *indorsement* of a negotiable instrument by a *person not already* a party to the instrument is called an indorsement "*in blank*," and cannot operate as an assignment, since he has nothing to assign. By some authorities the effect of such an indorsement is to introduce the person into the note as a co-maker; others hold that he becames a guarantor. The Law of Bills and Notes, to which this contract belongs, is one of the most important subdivisions of the Law of Contracts. To secure uniformity in its rules as between our American States, its various provisions have been codified into a "*Negotiable Instruments Law*," which has been adopted by many of them as a statute.

READ: 2 Bl. Com., pp. 466–470;
3 Kent Com., Lect. xliv, pp. 71–121;
Walker, American Law, §§ 215–224;
Andrews, American Law, §§ 582, 583;
Clark, Elementary Law, § 141;
Darlington, Personal Property, pp. 123–125;
Addison, Contracts (Abbott and Wood Ed.), pp. 751–791;
1 Parsons, Contracts, pp. 238–292.

§ 170. Of Title by Contract: Contracts of Guaranty and Suretyship.

A *contract of guaranty and suretyship* is a contract by which the promisor agrees that another contract, made by a third person

with the promisee, shall be fulfilled; and that in case it should not be fulfilled he will himself indemnify the promisee for any loss occasioned by its non-fulfilment. This contract is always collateral to and dependent upon some *valid primary contract* between the third party and the promisee. It must be *in writing*, under the Statute of Frauds. If made at the same time with the primary contract, the *consideration* of that contract will support this also; if made afterwards, it must be based upon a new and valuable consideration of its own. The promisee must formally *accept the guaranty* and notify the guarantor thereof, unless such acceptance is implied from the nature of the transaction. A guaranty may be *general*, intended to secure any person to whom the ownership of the primary obligation may be transferred, as in the guaranty of a negotiable note, and is then assignable with the primary contract; or it may be *special*, intended to protect only a definite promisee, and is not then transferable until after the primary obligation has matured and the right of action on the guaranty has become complete. The *liability of a guarantor* to fulfil the primary obligation, or to indemnify the promisee, does not arise until the promisee has exhausted all his legal remedies against the original promisor, or until the impossibility of obtaining any relief against him has become so apparent as to render any effort to pursue him futile and unwise.

Rem. The liability of a guarantor or surety is measured strictly by his contract. When the *guaranty is limited* to a particular act of the third person the promisee must give immediate *notice* of any default to the guarantor, if it be necessary that the guarantor should know it in order to protect himself. If the guaranty is a *continuing guaranty*, covering a number of future obligations, it is sufficient to give notice after all the obligations have accrued. A guarantor or surety is *released* from liability if the promisee enters into a new contract with the original promisor which supersedes the old, or makes an agreement with him upon a new consideration to extend the time for the performance of the primary obligation, or grants him any other indulgence from which the guarantor has suffered loss, unless the guarantor's consent thereto has been obtained. In order to protect himself a *guarantor may satisfy* the primary obligation when it becomes due; or may invoke the aid of a court of equity to *compel the original promisor to perform* it

according to its terms, or to force the promisee to *pursue his remedy* against the original promisor without delay. Where a *guarantor himself satisfies the obligation* he is entitled to remuneration from the original promisor and is *subrogated* to all the rights and securities held by the promisee against him for the enforcement of his claim; and if he is one of several guarantors of the same primary obligation, equity will compel the others to *contribute* their *pro rata* shares.

READ: 3 Kent Com., Lect. xliv, pp. 121–124;
Walker, American Law, §§ 244–246;
Andrews, American Law, § 581;
Clark, Elementary Law, § 142;
Darlington, Personal Property, pp. 150–155;
Addison, Contracts (Abbott and Wood Ed.), pp. 648–674;
1 Parsons, Contracts, pp. 31–38;
2 Parsons, Contracts, pp. 3–31.

CHAPTER III

OF FAMILY RIGHTS

§ 171. Of the Nature and Classes of Family Rights.

Family rights are those rights which arise out of the domestic or family relations. Some of these rights are reciprocal rights between the members of the family themselves; others inhere in them, by virtue of their family relation, against the outside world. All of them are in addition to the personal and property rights which, as individuals, the members of the family possess, though sometimes qualifying or restricting them. From the fact that these rights grow out of certain definite relations they are often called *relative rights*. Of such relations there are five: (1) Husband and Wife; (2) Parent and Child; (3) Guardian and Ward; (4) Master and Servant; (5) The Family Head and his Dependants.

Rem. Originally our law recognized only the household head as amenable to its rules and held him responsible for the conduct of his wife, children, wards, servants, and dependants, giving him at the same time over them a practically absolute control. Thus family rights, so far as the law was concerned, comprised only the rights and obligations of the household head to the outside world; the reciprocal rights of the members of the family, and the rights and duties of the inferior members in reference to third parties, being substantially ignored. Many vestiges of this doctrine still remain, though for the past two centuries a tendency has manifested itself, rapidly increasing in the last fifty years, to treat all members of the family as individually subject to the law and, as far as possible, independent of one another. The influence of this tendency upon the law relating to family rights has been to introduce confusion and uncertainty into a system once simple and complete. The authority and responsibility of the house-father has been diminished by statutes and decisions to an indefinite extent. The independence of wives, children, and other inferiors has been asserted, but without specifying the limits to which it extends. The reciprocal rights of the members

of the family have been declared, but without providing any adequate remedies to enforce them. Such evils are inevitable in the transition from an established policy based on ages of experience to one arising out of theory and speculation, and can only be removed by patient wrestling with the many problems which modern social and domestic life presents.

READ: 1 Bl. Com., p. 422;
Schouler, Domestic Relations, §§ 1–10.

SECTION I

OF THE RIGHTS ARISING OUT OF THE RELATION OF HUSBAND AND WIFE

§ 172. Of Marriage.

The relation between husband and wife is created by marriage. *Marriage*, as an act creating a relation, is a form of contract; to which parties, a consideration, a subject-matter, and an actual proposal and acceptance are necessary. The *parties* are a man and woman who, under the current rules of law, are qualified to marry. The *consideration* is the mutual promise of each party to enter then and there into the marriage state. The *subject-matter* is the marital relation with all its duties and privileges as prescribed by law. The *proposal and acceptance* is the intelligent and voluntary consent of the parties to take one another as husband and wife. A *contract of marriage* may be made by any acts or words by which the parties express to one another their consent to become, from that moment onward, husband and wife except in States whose statutes require certain ceremonies to be observed; and even in many of these States the marriage will be valid where the ceremonies are omitted though the parties may be punished personally for their offence. A marriage contract, valid by the laws of the State where it takes place, is *valid* in all other States unless it is there considered contrary to good morals or sound views of public policy. The relation created by the contract of marriage involves a *change in the status* of both parties; of the husband in reference to the wife and to all other persons with whom he comes into legal contact through her agency or on her account; of the wife, not only as to the husband, but as to all the world. The rights and obligations of this new

status are defined by law, and the parties have no power to vary them nor to terminate the status, though the State can do so at its pleasure.

Rem. The contract *of* marriage is usually the fulfilment of a prior contract, — the contract *to* marry; which also rests upon the consideration of mutual promises, and a breach of which, by any party competent to make it, is actionable at law. The formal distinction between these two contracts is that the contract *to* marry is made *per verba de futuro*, or words which speak concerning the future, near or remote; while the contract *of* marriage is made *per verba de presenti*, or words which speak concerning the present moment. To be *legally qualified* to enter into a contract of marriage the parties must be (1) Of sufficient age; (2) Of sound mind; (3) Of physical capacity; (4) Not related to one another within the prohibited degrees; (5) Not involved in another existing marital relation. The *age* anciently required was twelve for females and fourteen for males; at present local statutes usually prescribe an age much more advanced. The *sound mind* consists in the mental ability, at the instant of the marriage, to comprehend the nature of the contract and its consequences, and sufficient will power to enter into it with the other party without external control. The *physical capacity* of both the parties must be such as to enable them to fulfil the main purpose of the marriage relation, which is the procreation of children; and the permanent impotence of either, at the date of the marriage, renders it invalid. The *prohibited degrees* include all lineal relationship, the collateral degrees of brother and sister, and in some States those of uncle and niece and of aunt and nephew. A party is involved in an *existing marriage relation* when having another husband or wife living and undivorced. A *contract of marriage* valid on its face is *void* if either party was *fraudulently misled* by the other in reference to any matter essential to the honor and perfection of the marriage relation, or has been *coerced* into the marriage by the exercise of unlawful physical control; and can be annulled, and the status of the parties set at rest, by a decree in equity, unless some special proceeding has been provided under the local law.

READ: 1 Bl. Com., pp. 433–440;
2 Kent Com., Lect. xxvi, pp. 75–93;
Barbour, Rights of Persons and Property, pp. 127–134;
Dwight, Law of Persons and Property, pp. 142–159;
Walker, American Law, §§ 102, 103;
Andrews, American Law, §§ 473–487;
Clark, Elementary Law, § 152;
Wharton, Conflict of Laws, §§ 126–182;

Schouler, Domestic Relations, §§ 11–34;
Tiffany, Domestic Relations, §§ 1–30;
Long, Domestic Relations, §§ 3–57;
Addison, Contracts, pp. 834–864;
2 Parsons, Contracts, pp. 60–83, 593–602;
2 Greenleaf, Evidence, §§ 460–464.

§ 173. Of Divorce.

A marital relation once validly contracted is dissoluble only by the death of one of the parties or by divorce. A *divorce* may be granted by the State through its courts or legislature for any cause it deems sufficient, and independently of the consent or dissent of the parties, although in practice it rarely interferes between them unless one of them invokes its aid. Divorces are of two kinds: (1) Divorce *a vinculo*, or from the bond of marriage; (2) Divorce *a mensa et thoro*, or from bed and board only. *Divorce a vinculo* severs the marriage tie completely and forever, and unless granted subject to prescribed conditions leaves each party free to contract another marriage. *Divorce a mensa et thoro* merely suspends the marital relation, and separates the wife from the husband's household under such provisions for her personal freedom and support as the court may ordain. When a divorce *a vinculo* is granted to a wife from a husband owning property or receiving income the court may order him to pay her a certain sum as *alimony*, either in gross or in instalments; and may enforce its order by imprisoning him for contempt. The *custody of the minor children*, if any, may be awarded by the court to either party or to a third person, as the interests of the children may demand. A *decree of divorce* granted in one State, by a court having jurisdiction over both the subject-matter and the parties, is valid in all other States unless at variance with their political or moral standards. A divorce obtained by *collusion* between the parties, or by fraud, is void.

Rem. The recognized *causes for divorce* vary with the State, and with the changes in public opinion. Among them are adultery, cruelty, continued desertion, incurable insanity, imprisonment for life, and incompatibility of temper. The *voluntary separation* of a husband and wife, without the concurrent action of the State, is not a divorce; though, if the agreement of sepa-

ration is a reasonable one, a court of equity can enforce it at the instance of either party. Where a husband *abandons* his wife, or becomes permanently incapacitated to fulfil his duties, the marriage relation is not thereby affected, though for many business purposes the wife is then regarded as a *feme sole.*

READ: 1 Bl. Com., pp. 440, 441;
2 Kent Com., Lect. xxvii, pp. 95–118, 125–128;
Barbour, Rights of Persons and Property, pp. 134, 135;
Dwight, Law of Persons and Property, pp. 159–190;
Walker, American Law, § 106;
Andrews, American Law, §§ 488–497;
Clark, Elementary Law, §§ 157, 158;
Wharton, Conflict of Laws, §§ 204–239 *g*;
Schouler, Domestic Relations, §§ 227–234;
Tiffany, Domestic Relations, §§ 93–109;
Long, Domestic Relations, §§ 129–146;
2 Parsons, Contracts, pp. 84, 85, 603–606;
2 Greenleaf, Evidence, §§ 40–58;
Maxwell, Pleading and Practice, §§ 495–524.

§ 174. Of the Effect of Marriage.

The effect of marriage is the *union* of the parties *in one legal person,* represented by the person of the husband in whom the personality of the wife was once totally, and is still to a considerable extent, submerged. Under the older law all the rights, duties, and liabilities which attached to her as an unmarried woman either became at the instant of the marriage his duties, rights, and liabilities, or by the marriage were extinguished, or were suspended until the marriage was dissolved. He assumed all responsibilities for her *ante-nuptial debts,* as well as for her *future torts* and frauds. Her independent *contracting power was lost,* and she could make no agreements with her husband, nor with other persons except through him and with his consent. She could *neither sue nor be sued* apart from him. Her *property vested in him,* either absolutely like choses in possession, or at his option like choses in action, or during coverture like her estates in fee, or during his own life like his estate by curtesy. With social changes numerous modifications of these doctrines have been introduced into our modern law.

Rem. The modern law concerning the submergence of the personality of the wife in that of the husband is incapable of any definite general expression, but must be sought in a complex and

fluctuating body of local statutes and decisions. Courts of equity have recognized her right to the exclusive control over property given to her *for her separate use*, her power to make agreements concerning it as if she were unmarried, and to enter into beneficial contracts with her husband. Local statutes *have emancipated him* from liability for her ante-nuptial debts, and for her torts committed during coverture; have made him the trustee rather than the owner of her personal estate; have given to her a qualified contracting power; and have liberated her to a great extent from his physical control. The degree to which, in any given State, this modification of the ancient law has proceeded can be ascertained only by consulting its current statutes and reports.

READ: 1 Bl. Com., pp. 442–444;
2 Kent Com., Lect. xxviii, pp. 129, 143–146, 149–181;
Rob. Am. Jur., §§ 41–43;
Barbour, Rights of Persons and Property, pp. 145–148, 166–178, 180–187;
Dwight, Law of Persons and Property, pp. 198–224, 229–232;
Andrews, American Law, §§ 499–506;
Clark, Elementary Law, §§ 153–155;
Schouler, Domestic Relations, §§ 35, 36, 52–64, 79–82 *a*, 87, 88–226;
Tiffany, Domestic Relations, §§ 35–43, 48–69, 74–92;
Long, Domestic Relations, §§ 58, 66, 69–103, 112, 113, 126–128;
1 Parsons, Contracts, pp. 340–347, 365–382.

§ 175. Of the Rights of the Husband as against the Wife.

The *rights of the husband* as against the wife are two: Obedience and Service. The husband has a legal right to the *obedience of his wife* because he is the family head, and because the peace and prosperity of every social organism depend upon the permanent recognition of some controlling authority. The ancient law upheld the husband in the exercise of this authority; what vestiges of it remain under our modern law it is not easy to determine. A husband also has a *legal right to the service of his wife* in the household, according to the customs prevailing among families in the same station in life; and also in such other spheres of labor as she consents to enter. *Her wages* earned while working for outside parties belong to him personally, or as trustee for her and their children. But he cannot oblige her to seek employment beyond the limits of his own household, nor require her to render services within it to persons who are not members of their common family.

Rem. The value of these rights of the husband against the wife, if measured by his ability to legally enforce them, is at the present time almost infinitesimal. Any attempt at direct physical coercion on his part is generally treated as a crime, and the courts afford him no relief except by a divorce. He may indeed put moderate restraints upon her liberty of action by withholding means for its enjoyment, and if she elopes without cause he may, in extreme cases, obtain possession of her person by a *writ of habeas corpus* if, in the judgment of the court, it is expedient for both parties that she should return; but even then he cannot confine her to prevent her future escape, nor can he in any case employ unreasonable force against her to keep her from committing crimes or civil wrongs.

READ: 1 Bl. Com., pp. 144, 145;
2 Kent Com., Lect. xxviii, p. 181;
Barbour, Rights of Persons and Property, pp. 148–153;
Dwight, Law of Persons and Property, pp. 190–198, 225, 226, 229;
Walker, American Law, § 104;
Clark, Elementary Law, § 153;
Schouler, Domestic Relations, §§ 37–42, 46–50, 172;
Tiffany, Domestic Relations, §§ 31–34, 48, 56;
Long, Domestic Relations, §§ 59–63, 65–68.

§ 176. Of the Rights of the Wife as against the Husband.

The *rights of the wife* as against the husband are also two: Protection and Support. It is the legal duty of the husband *to protect the wife* from personal injuries at the hands of third parties, and in so doing he may use the same degree of violence as if the injury were attempted against himself. This duty the law recognizes and asserts, but is unable to enforce. It is the duty of the husband *to support the wife* by providing her with necessaries such as food, clothing, shelter, and medical attendance, according to their station in life; and if he fails to do this of his own volition she may procure them on his credit if she can, and he will be obliged to pay for them. If he *abandons* her, or drives her from the household, he leaves or sends his credit with her, and she may still contract debts for her necessaries in his name. A husband cannot *withdraw his credit* from his wife by notifying the public not to deal with her on his account, unless her own misconduct has forfeited her right to be supported by him, or he has already furnished her with adequate supplies. But *her right is lost* if she elopes with an

adulterer, and *is suspended* if, without just cause, she abandons her husband and does not repent and offer to return.

Rem. *Necessaries*, which it is the duty of a husband to provide for his wife, may embrace many other species of articles besides those above enumerated. Whatever local customs or the emergencies of the particular case render it necessary for the wife to have, in view of her family duties and her station in life, fall under the same rule, such as pew-rent if she is a church-goer, or legal expenses incurred by her in defending herself against her husband. A husband is not bound to support the wife *outside the household* if he provides for her and treats her properly within it; nor when they are *living apart under a mutual agreement* which makes her a reasonable allowance; and in all cases persons who supply her on his credit without his consent do it at their peril, and cannot charge him if it afterwards appears that he had already sufficiently provided for her needs.

READ: 1 Bl. Com., pp. 442, 443, notes;
2 Kent Com., Lect. xxviii, pp. 146–149;
Barbour, Rights of Persons and Property, pp. 153–166;
Walker, American Law, § 105;
Clark, Elementary Law, § 153;
Schouler, Domestic Relations, §§ 45, 51, 65–78;
Tiffany, Domestic Relations, §§ 70–73;
Long, Domestic Relations, §§ 64, 99, 114–125;
1 Parsons, Contracts, pp. 347–364.

§ 177. Of the Rights of the Husband and Wife to One Another as against Third Parties.

As *against third parties* the husband has a right to the personal security and liberty of the wife, to her conjugal society, and to her services. Any *attack upon her person or her freedom* is a direct injury to him, distinct from and additional to the injury inflicted upon her. Her *conjugal society* consists in the affectionate companionship of a chaste and loyal wife, and to this the husband is entitled as against any person who would alienate from him her affection, remove her from his household, or seduce her into an adulterous connection. Her *services* include the willingness and ability to render them; and any interference of third parties which dissuades her from the performance of her duty, or impairs her capability to discharge it, is an infringement of his rights. The *rights of a wife* in her husband as against third parties are not as yet so well defined

and clearly recognized. Her natural rights in his life, health, and freedom, in his conjugal companionship, and in his marital support are not inferior to his in her; and gradually the law is giving to these rights its sanction by statutes or decisions which afford her remedies for their violation.

Rem. At the time when the household was recognized as the social unit, and the husband as its head was clothed with power to compel the obedience of all its members and to protect them against all external interference, it was logically inevitable that all legal rights and remedies against third parties should reside in him alone, as the family superior; while the natural rights of the inferior members of the family in him against third parties should be legally ignored, and wrongs against them be left to such redress as the natural *lex talionis* might suggest. With the disappearance of this theory of the household and its headship these natural rights emerge and demand legal recognition. The reluctance of some courts to assert them, on the ground that legal precedents are wanting, evidences a failure to appreciate the inexorable consequences of social evolution, and the danger of still leaving these rights to be vindicated by the methods of the natural law.

READ: 4 Bl. Com., pp. 313–317;
Barbour, Rights of Persons and Property, pp. 178–180;
Clark, Elementary Law, § 153;
Schouler, Domestic Relations, §§ 43, 83–86;
Tiffany, Domestic Relations, §§ 44–47;
Long, Domestic Relations, §§ 104–109.

SECTION II

OF THE RIGHTS ARISING OUT OF THE RELATION OF PARENT AND CHILD

§ 178. Of Children: Legitimate, Illegitimate, and Adopted.

Three classes of children are known to the law: (1) Legitimate Children; (2) Illegitimate Children; and (3) Adopted Children. A *child is legitimate* when it is born during, or within the usual period of gestation after, the coverture of its mother and is not proved to have been the offspring of an adulterous intercourse. Whether a child thus born was conceived before or during coverture does not affect its legitimacy. A *child is illegitimate* when it is not born during, or within a competent

time after, the coverture of its mother, or is proved to have resulted from an adulterous intercourse. Every child which is born during coverture, or within about ten months after the coverture, is therefore *presumed to be legitimate*, and neither he nor his mother nor her heirs are permitted to assert the contrary; but the husband of the mother and his heirs may deny the paternity and show, if they are able, that the child is illegitimate. An *adopted child* is one between whom and the adopting parent the filial relation is established, not by processes of nature, but by process of law. Between parents and legitimate children a complete and perfect filial relation exists. Between parents and illegitimate children the relation is always imperfect: sometimes to the denial of all ties between it and its father except such as are necessary to relieve the public from the burden of its physical support. Between adopted children and their adopting parents the relation is more or less complete, according to the undertaking of the parent and the provisions of the local law.

Rem. An *illegitimate child* is said to be *nullius filius*, or the son of nobody; and this is true as to all property rights whose existence depends upon his legal relationship to his father. Hence he has *no inheritable blood* in the paternal line, and no family name until by reputation he acquires one of his own. He is, however, *the son of his mother*, and under the laws of some States may inherit her property. If his father and mother marry after his birth, and the father then acknowledges him as his child, he thereby *becomes legitimate*, and thenceforth has the same rights as if he had been born in wedlock. An illegitimate child has *no rights against its parents*, except that of support. This right is primarily assertible only against the mother; but by statute the obligation is generally extended to the putative father, and may be enforced against him either by the mother or by the town or parish on which the maintenance of the child would otherwise devolve. The right to the *custody and control* of an illegitimate child is also in the mother, though courts of equity may for sufficient cause transfer it to the father or to some third person. *Adopted children*, though legally the children of the adopting parent and capable of inheriting his estate, do not derive from him any inheritable blood so as to inherit through him from his ancestors or from his collateral relations. Nor, on the other hand, do they lose the inheritable blood which they received from their natural parents, so as to be debarred from taking by descent

from them or through them from their ancestors and relatives. *Adoption statutes* are liberally construed in favor of the adopted children; and to the extent to which their relation to their adopting parent resembles that of natural children and their parents, do their rights and obligations also correspond.

READ: 1 Bl. Com., pp. 446, 454–459;
2 Kent Com., Lect. xxix, pp. 208–217;
Barbour, Rights of Persons and Property, pp. 187, 188, 200–212;
Dwight, Law of Persons and Property, pp. 254, 255, 256–267;
Walker, American Law, § 108;
Andrews, American Law, §§ 507, 508;
Clark, Elementary Law, §§ 159, 161;
Wharton, Conflict of Laws, §§ 240–251, 257–257 *a*;
Schouler, Domestic Relations, §§ 235–243, 289–296;
Tiffany, Domestic Relations, §§ 110–113;
Long, Domestic Relations, §§ 147–151, 168;
1 Parsons, Contracts, pp. 337, 338;
2 Greenleaf, Evidence, §§ 150–153.

§ 179. Of the Rights of Parents as against their Legitimate Children.

The *rights of parents* as against their legitimate children vest primarily in the father, and are three: Custody, Obedience, and Services. The father has a right to the *custody* of his legitimate minor child unless, for the welfare of the child, it has been committed to some other person by the courts. He is also entitled to its *obedience* and may compel it, by a reasonable exercise of force, to submit to his commands; but he has no right to abuse it or inflict upon it any permanent injury. He also owns the *services* of the child and all the results thereof, and these are assets which his creditors may take in satisfaction of his debts. A father can *emancipate his child* by relinquishing to it his right to its services, which then become the property of the child even against the father's creditors.

Rem. Unless by virtue of the decree of a competent court the *mother* has no right to the custody, obedience, and services of a legitimate child during the lifetime of the father. After his death, however, the parental right and authority naturally and legally devolve upon her, subject to judicial intervention for the welfare of the child. Persons standing *in loco parentis* to the child, such as schoolmasters, guardians of the person and the like, have a right to its custody and obedience, but not to its services.

READ: 1 Bl. Com., pp. 452–454;
2 Kent Com., Lect. xxix, pp. 203–208;
Barbour, Rights of Persons and Property, pp. 192–200;
Dwight, Law of Persons and Property, pp. 239–249, 255, 256;
Walker, American Law, § 110;
Andrews, American Law, § 510;
Clark, Elementary Law, § 163;
Wharton, Conflict of Laws, §§ 253–256;
Schouler, Domestic Relations, §§ 250, 255–269;
Tiffany, Domestic Relations, §§ 122–130;
Long, Domestic Relations, §§ 160–163, 165–167;
1 Parsons on Contracts, pp. 309–311.

§ 180. Of the Rights of Legitimate Children as against their Parents.

The *rights of legitimate children* as against their parents are two: Protection and Support. It is the duty of a father to *protect* the persons of his legitimate minor children while under his control, and if he neglects it he may be criminally liable. In their *defence* he may lawfully do anything that he might do in defence of himself. He is also obliged to *support* them and provide them with necessaries according to his station in life, including a suitable education; and if he fails to do this while they are living in his household, or if he drives them from it by his cruelty, any third person may supply them and charge the father with their cost. In this case, however, the third person acts at his peril and has no redress against the father if he had made other adequate provision for the child. Upon the death of the father his duties to the children rest upon their *mother* in a degree proportioned to her power to fulfil them.

Rem. An *emancipated child,* living apart from its father, is responsible for its own support, and persons furnishing it with necessaries are presumed to look to it for payment; but this does not entirely release the father from his obligation in case the child should be unable to discharge the debt. The husband of a mother, who has living minor children by a former marriage, owes to the *step-children* no duty of support unless he formally adopts them; but if he takes them into his household, and treats them as his own, he may become liable for necessaries supplied to them by third persons under the belief that they are his offspring.

READ: 1 Bl. Com., pp. 446–452;
2 Kent Com., Lect xxix, pp. 189–203;

Barbour, Rights of Persons and Property, pp. 188–192;
Dwight, Law of Persons and Property, pp. 233–239;
Walker, American Law, § 109;
Andrews, American Law, § 509;
Schouler, Domestic Relations, §§ 244–254;
Tiffany, Domestic Relations, §§ 114–121;
Long, Domestic Relations, §§ 152–158, 169;
1 Parsons on Contracts, pp. 299–309.

§ 181. Of the Rights of Parents and their Legitimate Children as against Third Parties.

The *rights of a father*, as such, against third persons grow out of his right to the custody, obedience, and services of the child. Thus he has a right to the personal *security and liberty* of the child, and so far as their invasion impairs his control over it or the amount or value of its services to him, or increases the burdens involved in its support, he sustains an injury for which the law affords a remedy. He also has a right to the *voluntary residence* of the child within the precincts of the household, and its removal therefrom by force or fraud or enticement is an infringement of his rights. Where the child renders service to third persons, unless it has been emancipated by its father, the *wages earned* by it belong to the father, and may be collected by him from the employer. A father is not liable to third persons for the *torts of the child* unless they were committed under his direction, or with his encouragement and sanction. Nor is he responsible for the *contracts of the child* except for necessaries which he has himself failed to supply, or when the child has acted as an agent under his express or implied authority. The *rights of a child*, as such, against third persons are founded, like those of the parent, on the law of nature and pertain to the freedom of the parent from such wrongful interference as diminishes his power to protect and support the child. These rights are beginning to obtain legal recognition, but are not as yet completely defined and adequately enforced.

Rem. Injuries inflicted on a father, depriving his children of his protection and support, were avenged under the law of nature and in primitive society in the same manner, and for the same reason, as those which deprived a wife of the society of her husband. The assertion of the right to such redress by our modern legislation has been occasioned by various influences, more or

less identified with attempted social reforms, and not directly intended for the benefit of the wife or child.

READ: 3 Bl. Com., pp. 139, 140, 142, 143;
Clark, Elementary Law, § 162;
Schouler, Domestic Relations, §§ 270–277;
Tiffany, Domestic Relations, §§ 131–158;
Long, Domestic Relations, §§ 159, 164;
Ante, § 177, *Rem.* and notes.

§ 182. Of the Reciprocal Rights of Parents and their Adult Legitimate Children.

The reciprocal rights of parents and legitimate children cease, for the most part, when the children reach their majority. But when *adult children* become paupers and are chargeable to the public, the legal provisions made to secure proper protection for the poor and helpless usually cast upon their parents a portion of the burden of maintaining them. And similarly, when parents become destitute their adult children, who have means, may be compelled to contribute to their support. Certain States extend this obligation to more remote relations, especially in the ascending and descending lines. Moreover, when adult children remain in the household of their parents many of the rights and duties which attach to the filial relation are presumed to continue, — such, for example, as gratuitous support on one side and gratuitous service on the other, — unless by some agreement between them a contrary intent is shown. Even when such an agreement has been made the children will still stand toward the parents in some form of the relation between dependants and their family head.

Rem. A minor child attains its *majority* when it reaches the age of twenty-one years, — that is, when twenty-one complete years have elapsed since the moment of its birth. As the law takes no notice of the fractions of a day, except for the purpose of determining the priority of two compared events, any event occurring on a given day is presumed to have taken place in each and every moment of the entire day. Thus the birth of a child is imputed to the first and all other moments of the day on which it was born and the expiration of its twenty-first year to the first and every moment of the day which precedes its twenty-first birthday, — that birthday being really the first day of its twenty-second year. A child, therefore, attains its majority on the first

moment of the day before its twenty-first birthday. This example illustrates the legal method of reckoning intervals of time between events, or from one event to another.

READ: 1 Bl. Com., p. 448, notes;
Bishop, Written Laws, §§ 104 *b*–110 *c*;
Walker, American Law, § 22;
Clark, Elementary Law, § 163;
Schouler, Domestic Relations, §§ 278–288;
Tiffany, Domestic Relations, § 143;
Long, Domestic Relations, § 162;
1 Parsons, Contracts, pp. 311, 312.

SECTION III

OF THE RIGHTS ARISING OUT OF THE RELATION OF GUARDIAN AND WARD

§ 183. Of the Species of Guardians.

The *relation of guardian and ward* is of legal origin, and is intended partly to supplement and partly to supply the place of that of parent and child. Guardians as to their *functions* are of two species: Guardians of the Person; and Guardians of the Estate. A *guardian of the person* is the instrument through whom the State endeavors to preserve the personal rights of minor children whose parents are dead or are unable to afford them adequate protection. A *guardian of the estate* is the instrument through whom the State endeavors to preserve the property rights of all children during the period of their minority. The same individual may be the guardian of both the person and estate of the minor child, but his rights and duties in each capacity still remain entirely distinct from one another. Guardians, as to their *mode of creation*, are of three species: (1) Guardians by Nature; (2) Testamentary Guardians; and (3) Guardians by Appointment. A *guardian by nature* is the father of the child, or in the event of his death the mother, and has the legal as well as the natural care and custody of the person of the child during its infancy, but has no control over its estate unless also made a testamentary guardian or a guardian by appointment. A *testamentary guardian* is one designated by the deed or last will of a parent to take charge of the person or estate of his minor child, or both, until it arrives at its majority.

A *guardian by appointment* is one appointed by a competent court to control the person or manage the estate of a minor child. Power to appoint such guardians resides in courts of equity, and in probate courts and other courts exercising equity powers. A guardian of any species may be *removed* by the proper court for any sufficient cause, and another be appointed in his stead. A testamentary guardian or a guardian by appointment may, by permission of the court, *resign* unless the interests of the ward require his continuance in office. A *guardianship expires* upon the death of the ward, or upon the marriage of a female ward to an adult husband. The marriage of a male ward, or of a female ward to an infant husband, extinguishes the guardianship of their persons but not that of their estates.

Rem. Many species of guardianship existed under our ancient law of which only the three, above enumerated, now survive. *Testamentary guardianship* originated in the Statute 12 Charles II. ch. 24 (A. D. 1661), and is recognized in most of our American States. This guardianship supersedes all others as to the person of the child, and as to whatever estate the child may have derived from the testator. It is *fiduciary* in its character, and hence cannot be delegated by the guardian to any other person; and should the guardian die or be removed during the child's minority, and the will make no provision for his successor, another guardian must be appointed by the court, who will not be a testamentary guardian though his duties will be regulated by the will. Guardians by appointment may be *designated* by the proper court either on its own motion, or on the application of the child itself, or at the request of any person interested in the child. Children above the age of fourteen, and in some States female infants over twelve, may *nominate* their own guardian, and if the persons nominated are suitable the court must approve them. In the absence of such nomination the court may select any person, not disqualified by want of capacity or integrity, though the next of kin to the child usually receives a preference. On accepting his appointment the guardian must qualify by taking the customary official oath, and giving bonds for the faithful performance of his duties.

READ: 1 Bl. Com., pp. 460–463;
2 Kent Com., Lect. xxx, pp. 220–227;
Barbour, Rights of Persons and Property, pp. 212–237;
Dwight, Law of Persons and Property, pp. 268–276;
Walker, American Law, §§ 111, 112;

Andrews, American Law, § 516;
Clark, Elementary Law, §§ 164, 165, 167;
Wharton, Conflict of Laws, §§ 259, 260;
Schouler, Domestic Relations, §§ 297–346, 381–405;
Tiffany, Domestic Relations, §§ 145–152, 155–158, 146–190;
Long, Domestic Relations, §§ 170–176, 178.

§ 184. Of the Reciprocal Rights of Guardians of the Person and their Wards.

The reciprocal rights of *guardians of the person* and their wards resemble, but are not identical with, the rights of parents and their children. The guardian has a right to the *obedience* of the ward and owes it the duty of *protection;* but he is not entitled to its *services*, nor is he responsible for its *support* unless he is also the guardian of its estate. He may fix the *residence* of the ward in any suitable location within the jurisdiction of the court by which he was appointed, and in matters necessary to the welfare of the ward he may exercise over it the same *physical control* as if he were its father. But he cannot compel a ward to labor as a father might, except for its own support and where it has no property the income of which would be sufficient to maintain it.

Rem. Although a guardian of the person alone is not always required to give a *bond* for the faithful performance of his duty, yet he is always subject to the supervision of the court having jurisdiction over the ward and may be compelled to treat the ward in a proper manner; or where the welfare and comfort of the ward requires it he may be removed and another appointed in his place. He is entitled to reasonable *compensation* for his actual services if the ward has any estate out of which it can be derived; but he is not allowed to take any advantage of his position in dealing with the ward, either as to its personal or property rights.

READ: Clark, Elementary Law, § 166;
Wharton, Conflict of Laws, §§ 261–264;
Tiffany, Domestic Relations, §§ 159–165;
Long, Domestic Relations, §§ 179, 180;
Schouler, Domestic Relations, §§ 347–358.

§ 185. Of the Reciprocal Rights of Guardians of the Estate and their Wards.

The *guardian of the estate* of a minor child has no rights over the *person* of his ward; and owes it no other duty than to manage its property with reasonable care, to apply the income to its

support as far as necessary, and to surrender to it the balance of the estate when the guardianship expires. Upon his appointment it is his first duty to *collect and inventory* all the property belonging to the ward, and prudently *invest* it. He has a right to *sell the personal property* and to *lease the realty*, but cannot sell the realty unless the will or the court which appointed him empowers him so to do. If he suffers any *damage or waste* to befall the property through his neglect, or mingles the ward's money with his own, or lets it lie idle without cause, he must make good the loss. In applying the property to the *support of the ward* he must not invade the principal without express authority from the will or the court, but rather put the ward to work to make up the deficiency. At the close of his guardianship he must *render the account* required by law and restore the residue of the property to the ward or to its legal representatives. For any default in these duties he and his bondsmen are responsible.

Rem. While the management of his ward's estate is left largely to the sound discretion of the guardian, yet the law strictly forbids the guardian to use it for *his own advantage*. He is not allowed to deal personally with himself as guardian, as by buying property from or selling it to the ward's estate; and if he makes a profitable speculation with the ward's money, or settles a claim against the ward on favorable terms, the benefit accrues wholly to the ward. Over the final adjustment of guardianship affairs the law watches with great jealousy, and no release of the guardian by his former ward is binding on the ward, unless given after a full opportunity to become acquainted with the past management and present condition of the estate, and the utmost openness and good faith on the part of the guardian.

READ: 1 Bl. Com., pp. 462, 463;
2 Kent Com., Lect. xxx, pp. 228–231;
Barbour, Rights of Persons and Property, pp. 241–248;
Dwight, Law of Persons and Property, pp. 277–283;
Walker, American Law, § 114;
Andrews, American Law, § 516;
Clark, Elementary Law, § 166;
Wharton, Conflict of Laws, §§ 265–270;
Metcalf, Contracts, pp. 176–180;
Schouler, Domestic Relations, §§ 359–380;
Tiffany, Domestic Relations, §§ 167–185;
Long, Domestic Relations, §§ 181–185, 187, 188.

§ 186. Of the Rights of Guardians and Wards as against Third Persons.

A *ward has no rights* as against third persons in reference to his guardian, unless the guardian is its parent or other family head. A *guardian of the person* possesses rights in the ward's security and liberty, commensurate with his duty to protect it and its subjection to his physical control. A *guardian of the estate* is the current owner of the property as against all persons but the ward and its legal representatives; and can maintain an action for the infringement of his possessory rights, or of the ultimate rights of the ward now temporarily entrusted to his charge.

Rem. The legal remedies available to parents for injuries to the persons of their children are open also to guardians, but the compensation obtainable thereby accrues primarily to the benefit of the ward, unless the guardian can show that by the injury he himself sustained some pecuniary loss.

READ: 3 Bl. Com., p. 141.

§ 187. Of Guardians ad Litem.

A *guardian ad litem* is a transient guardian appointed by a court before which an infant, who has no other guardian, has been made defendant in a civil action or a criminal prosecution, to protect the interests of the infant in the litigation. Unless an infant defendant is represented in court by a guardian of some kind, *no valid judgment* can be rendered against him. In selecting such a guardian the court must consult the welfare of the infant alone, and if possible obtain his concurrence or that of his parents or other friends. The special rights and duties of a guardian *ad litem* are determined by the local law.

Rem. An infant plaintiff who has no regular guardian, or whose guardian is defendant in the action, must sue by *prochein ami*, or next friend, who conducts the litigation on his side as a guardian *ad litem* does on behalf of an infant defendant. The *prochein ami* may be his parent or any other person who is willing to undertake the suit, and may be selected by the infant himself or, if the infant is incapable of making a selection, may intervene to protect the infant of his own accord.

READ: 1 Bl. Com., p. 464;
3 Bl. Com., p. 428;

2 Kent Com., Lect. xxx, p. 229;
Rob. Am. Jur., § 31;
Barbour, Rights of Persons and Property, pp. 237–241;
Dwight, Law of Persons and Property, p. 276;
Tiffany, Domestic Relations, § 154.

§ 188. Of Guardians of Incapables.

Adults who, from want of intelligence or feebleness of will, resemble infants in their incapacity to protect their persons, or manage their estates, may be *placed under guardianship* by courts of equity, and subjected to the same control as if they were still minors. The law relating to these guardianships is mainly statutory, and varies in its details in our different States. In all cases, however, the appointment of a guardian for an adult must be preceded by the judgment of a competent tribunal, finding the proposed ward to be in fact incapable, after a trial in which he has had an ample opportunity to appear and be heard. The measure of control over his property and person confided to the guardian must be restricted in kind and in degree to that which his condition evidently requires; and may thus partially or completely deprive him of self-direction or contracting power. The guardianship *continues* only during the incapacity, and when in the judgment of the court his capacity is restored the guardian must be withdrawn, and the remainder of his property must be returned to him.

Rem. *Incapables* embrace a large and diverse class of individuals who are below the normal standard of ordinary men and women. Among them are the insane, the imbecile, the habitual drunkard, the spendthrift, and whosoever else may be unable to cope with the responsibilities in which his personal environment or his property interests involve him. The right of the State to interfere with such persons, and place them under guardianship, is based partly on its duty to protect all its subjects who are not qualified to protect themselves; and partly on its duty to guard the community at large against the mischief which such persons may commit, and the burdens of public support which the waste of their own property may entail. For, in the eye of the law, the State is only the greater family of which all its subjects are members, while the sovereign is the parent and the head who regulates the affairs of his vast household in such a manner as to conserve the life, liberty, and property of the individual, and at the same time to promote the welfare of the whole.

READ: 1 Bl. Com., pp. 302–306;
3 Bl. Com., p. 427;
Rob. Am. Jur., § 40;
Walker, American Law, § 113;
Andrews, American Law, §§ 511, 816;
Tiffany, Domestic Relations, § 153;
1 Parsons on Contracts, pp. 387, 388.

SECTION IV

OF THE RIGHTS ARISING OUT OF THE RELATION OF MASTER AND SERVANT

§ 189. Of Menials.

The *domestic relation* of master and servant subsists between employers and two species of employees, — Menials and Apprentices. A *menial* is a servant who dwells in the household of the master, and is employed about domestic concerns, under a contract, express or implied, to continue in service for a certain time. When the *duration of the service* is not specified in the contract it is generally fixed by custom, and each party is entitled to reasonable notice from the other of his intention to determine it. The *compensation* is usually proportioned to the term of service, as a gross sum for the entire service or for aliquot parts thereof; and in this case no portion of the sum is earned until the corresponding period of service is complete. Justice, however, will not permit the master to *discharge* the servant *without sufficient cause*, or to render his position in the household so uncomfortable that he will be compelled to leave it, and then refuse to pay him for the service which he has already rendered; nor will it tolerate a total forfeiture of wages when the *death or sickness* of the servant prevents the completion of the contract. In such cases, though the original contract of the servant is broken and therefore cannot be enforced against the master, a *quasi contract* based upon the fact that the master has enjoyed the benefit of a partial service, which was not intended nor expected to be gratuitous, takes its place and on this the servant can recover what his services were reasonably worth. But a servant who *abandons his employment* without cause, or is *dismissed* by the master for serious misconduct, cannot recover any portion of the gross sum which was to

become due only when the entire service was performed. This rule is modified in some States by the doctrine that if the master has derived advantage from the service, in excess of the amount of injury inflicted on him by the servant's misconduct or neglect of duty, the servant may recover the excess as his lawful wages.

Rem. The primary conception of a servant as a member of a household includes the idea of involuntary subjection to a master, and though this relation is now always created by a contract it still preserves some features of its original domestic character. Thus one who agrees simply to render services to an employer, without entering his family, occupies quite a different relation to the master from that of one who by his contract becomes also a member of the master's household. This difference is particularly apparent in the personal authority which the master has over the servant, and the rights and privileges which they enjoy against third parties.

READ: 1 Bl. Com., pp. 423–425;
Clark, Elementary Law, § 168;
Schouler, Domestic Relations, §§ 460–490;
Tiffany, Domestic Relations, §§ 248, 249;
2 Parsons, Contracts, pp. 32–48;
Ante, § 165.

§ 190. Of Apprentices.

An *apprentice* is a servant who is bound out to a master to learn some art or trade. This relation can be created only by an *indenture* to which the master and the apprentice, and if the apprentice is an infant his parent or guardian also, are made parties; though where an infant has no guardian or parent, and the learning of the trade is necessary to prepare him to maintain himself, the indenture may be executed on his part by him alone. An *apprenticeship ceases* on the death of the master, or on the arrival of the apprentice at the age limited in the contract. It may also be terminated for sufficient cause by the decree of a competent court, or by a mutual release between the parties. During its continuance the apprentice is a *member of the household* of the master and is supposed to reside therein. The master has *control over his person*, and may command his time and labor to any extent within the scope of the contract; and all the results of his service to third persons, whether rendered with or without the consent of the

master, belong to the master and can be collected by him for his own benefit. The apprentice has a right to be *supported by the master,* to be properly *instructed* in his trade, and to receive such other remuneration as the indenture provides. A *master cannot transfer* his rights over the apprentice to another person, nor send the apprentice into a foreign country, nor employ him in any labor not contemplated by the contract. But by consent of all the parties the entire contract of apprenticeship may be *assigned* to another master, and a new relation thus be substituted for the old.

Rem. In former times an apprenticeship to a master, under the general regulations above described, was required by law as a necessary preparation for the exercise of any trade involving technical skill and knowledge; and the domestic relation between a master and apprentice was closely assimilated to that of a parent and his minor child. In modern times this relation has largely lost its domestic character, for the reason that the apprentice does not ordinarily become a member of the master's household, but resembles rather a hired employee, of more or less permanent character, who receives instruction in a trade in compensation for his services. The tie between such employees and the master is governed partly by the ancient doctrines of apprenticeship, and partly by local statutes.

READ: 1 Bl. Com., p. 426;
2 Kent Com., Lect. xxxii, pp. 261–266;
Barbour, Rights of Persons and Property, pp. 269–282;
Dwight, Law of Persons and Property, pp. 315–322;
Walker, American Law, § 125;
Andrews, American Law, § 517;
Tiffany, Domestic Relations, § 248;
2 Parsons, Contracts, pp. 49, 50.

§ 191. Of the Reciprocal Rights and Duties of Masters and Servants.

To the relation of master and servant pertain all those rights and duties which arise, either by operation of law or by agreement of the parties, out of any ordinary *contract for services.* To these are added such as attach to the family aspect of the relation. Thus the master is entitled to the *obedience and service* of the menial or apprentice, according to the nature of the employment; and if the servant is an infant the master may use a reasonable amount of force to compel him to perform

his duties. The servant has a right to proper *food and shelter* in the household, while he remains a member of the family; to suitable *clothing* when the duty to supply it rests upon the master; and, if he is an infant, to such *protection* against injury by others as all dependent inmates of a household look for from their family head.

Rem. The right of a master to inflict *corporal punishment* upon his infant menial or apprentice grows, not out of the contract for services, but out of the *quasi*-parental relation which he occupies toward them; and this right in former times was recognized as including the power to recapture by force an escaping apprentice, and to invoke the aid of the courts in imprisoning him for persistent disobedience. Under the milder views of the present day the limitations upon parental authority, which forbid all severe, indecorous, and humiliating methods of punishment, apply also to the rights of masters over the persons of their minor servants.

READ: 1 Bl. Com., pp. 427, 428;
Tiffany, Domestic Relations, §§ 250–268;
2 Parsons on Contracts, pp. 50–52.

§ 192. Of the Rights of Masters and Servants as against Third Parties.

The rights of masters and domestic servants as *against third parties* are incidental to their beneficial interest in their contract for the service. The *master has a right* to enjoy the obedience and services of the menial or apprentice free from the interference of any outside party, whether by beating the servant, or by enticing him away, or by encouraging him in a neglect of duty; or, if the servant is a female, by her seduction. The *servant has a right* to the confidence and good will of the master, free from slanderous imputations upon his integrity or ability, and from intimidations of the master intended to procure his discharge. Domestic servants and their masters may *defend each other* against external violence in the same manner, and with the same degree of force, that they could employ in defending themselves; and masters may *abet such servants in lawsuits*, to protect or vindicate their personal or property rights, as parents can assist their children or guardians their wards.

Rem. The liability of masters to third persons for wrongs committed by a domestic servant, and on contracts made by such

a servant in their names, is governed by the principles and rules applied to ordinary employers and employees, and to principals and agents.

READ: 1 Bl. Com., pp. 429–432;
3 Bl. Com., p. 142;
Tiffany, Domestic Relations, §§ 269–274;
2 Parsons, Contracts, pp. 52, 53

SECTION V

OF THE RIGHTS ARISING OUT OF THE RELATION OF FAMILY HEADS AND THEIR DEPENDANTS.

§ 193. Of the Family Head.

The ancient conception of a unitary household, composed of persons variously related to one another and dwelling under the authority and protection of a single housefather, is also represented in modern law by the doctrine of a family head and his dependants. A *family head* is the owner of a habitation in which reside, under his direction and at his expense, relatives by blood or marriage for whose support he might be justly though not legally responsible. He need not be a parent, a husband, a master, or a guardian; nor need his dependants be so nearly related to him as to have any right to his assistance other than that which springs from natural charity and good will toward the members of the same domestic society. It is sufficient that, taken together, these individuals constitute for the time being a single household, sharing a common fortune and working out a common destiny.

Rem. Instances in which the courts have recognized this relation make evident its legal character. Such are the proprietor of a home in which his adopted daughter and her husband live with him; a brother giving shelter under his own roof to his sisters; a son with whom his dependent mother dwells; a widow having in charge the children of a deceased sister, or the step-children of her dead husband, or her own destitute adult children. In all these and analogous cases there exists a community which it is the manifest interest of the State to protect, and to accord to it equal if not higher privileges than ordinarily belong to the normal family.

READ: 1 Washburn, Real Property, § 547;
Wharton, Conflict of Laws, §§ 548–552.

§ 194. Of the Reciprocal Rights of the Family Head and his Dependants.

The *reciprocal rights* of the family head and his dependants are determined by the contract or *quasi* contract by which the family relation between them is created. No obligation between them originates by operation of law; but having formed themselves into a domestic society by agreement or concurrent action, the law imposes on them certain duties with reference to one another as long as they remain within the family. The *family head is entitled* to the *obedience* of his dependants in all matters which affect the welfare of the household as a whole, and to their *services* in sustaining the common burden which the form of the family organization distributes in definite tasks among them. The *dependants have a right* to the reasonable and proper discharge of the duty which the family head has assumed by undertaking their protection and support.

Rem. The legal remedies by which the rights of a family head and his dependants against one another are enforced are not now so far developed as to be in every case sufficient, — which is true also in the normal family; but where the parties cannot separate and sunder the relation some form of process, criminal or civil, to secure their rights is usually available.

§ 195. Of the Rights of a Family Head and his Dependants as against Third Persons.

The rights of a family head and his dependent as against third persons have never yet been fully enumerated and declared by law. So far as now defined they include the *right to defend the household* against forcible attacks; and the *right to hold the family habitation* against the claims of creditors. Where the dependants are minor children the family head stands to them *in loco parentis*, and can assert the same rights as a father to their liberty and security. Where they are adults, and injuries inflicted on them by third parties entail upon the family head an individual loss, he is entitled to redress as a master would be for the battery of a servant. The *rights of the dependant* to the freedom of the family head from such unlawful injuries or interference, as would impair his ability to render them their due protection and support, is recognized by statutes

in many of our States which afford them compensation in a suit for damages.

Rem. The resuscitation of the broader conception of the family by the legal recognition of the legal relation between the family head and his dependants is due largely to the enactment in this country of two classes of statutes known respectively as the "Civil Damage Acts" and the "Homestead Exemption Laws." The *Civil Damage Acts* were intended to visit the consequences of nefarious trades and other wrongful conduct, whereby families were ruined or impoverished through the corruption or injury of the family head, upon the persons engaged in the objectionable trade or guilty of the wrongful conduct; and provided methods by which compensation for such consequences could be obtained by the afflicted family. The *Homestead Exemption Laws* endeavor to protect the family home by exempting it from the claims of creditors, — an enemy sometimes more rapacious than any barbarous foe. Both these classes of statutes differ in details in our different States. In their interpretation by the courts the nature of a modern household, the constitution of the family composing it, and the relations between the various members and the family head have gradually been elaborated and defined.

READ: Washburn, Real Property, §§ 540–604;
Cooley, Torts, pp. 242–274;
Dwight, Law of Persons and Property, pp. 226–229;
Andrews, American Law, §§ 513–515;
Tiedeman, Real Property, §§ 158–164;
Kerr, Real Property, §§ 1499–1610;
Pingrey, Real Property, §§ 429–477;
Rice, Real Property, §§ 425–434;
Warvelle, Real Property, pp. 82–84;
Boone, Real Property, §§ 80 *a*–80 *g*;
Tiffany, Real Property, §§ 213–216, 499.

BOOK II

OF PRIVATE WRONGS AND REMEDIES

PART I — OF PRIVATE WRONGS

§ 196. Of the Nature of Private Wrongs.

A *private wrong* is the unlawful invasion of a private right. It contains two ingredients: (1) The *Injuria;* and (2) The *Damnum.* The *injuria* is the unlawful action or omission which causes the *damnum.* The *damnum* is the loss occasioned by the *injuria* to the owner of the invaded right. The *injuria* always must exist as a matter of fact. The *damnum* may exist as a matter of fact, or may be implied by law. In every private wrong both these ingredients must be present: and hence results the rule that no right of action can arise either out of a *damnum absque injuria* or out of an *injuria sine damno.*

Rem. It is sometimes stated that from an *injuria sine damno* an action *can* arise, but in these statements the word *damnum* is used in a narrow sense as covering only an *actual pecuniary loss.* In its broad and proper sense, including implied as well as actual damage, the *damnum,* equally with the *injuria,* is an indispensable ingredient of every private wrong.

READ: Rob. Am. Jur., § 142;
Broom, Com., pp. 70–94;
Walker, American Law, § 268;
Clark, Elementary Law, §§ 94–98;
Addison on Torts, §§ 1, 17, 18, 31, 32;
Cooley on Torts, pp. 62–68;
Jaggard on Torts, §§ 27, 28.

§ 197. Of the Forms of the Injuria.

The *injuria* may consist either in (1) Malfeasance; (2) Misfeasance; or (3) Nonfeasance. *Malfeasance* is the doing of that which the doer had no right to do, and is always a

wrongful *act*. *Misfeasance* is the doing, in an improper manner, of that which the doer was either bound to do or had a legal right to do; and involves an unlawful *excess or deficiency* in the quantity, quality, or method of the act performed. *Nonfeasance* is the not doing of that which the non-doer was under a legal obligation to do, and is always a wrongful *omission*.

Rem. Another classification of the *injuria*, characterized by the methods in which it may be committed, is into (1) Force; (2) Fraud; (3) Conspiracy; and (4) Negligence. *Force* is any species of violence, compulsion, or restraint, exercised by acts or words over or against the personal, or property, or family rights of another. When it produces its evil consequences without the intermediate operation of secondary causes it is called *direct force*, as where a blow is struck which wounds another. When it occasions loss only through the operation of secondary causes it is called *indirect force*, as where a log is cast into the highway over which another trips, falls, and is hurt. *Fraud* is the unlawful perversion of the intellectual conceptions of another, whereby damage is caused to his person or property. It may consist in *wilful deceit*, or the assertion by words or conduct of some matter of fact which the deceiver knows to be false or does not know to be true, for the purpose of misleading the other party and actually misleading him to his damage; or it may consist in an *intentional suppression of the truth* by wilfully concealing some matter of fact essential to the transaction but unknown to the other party, and which honesty and fair dealing would compel the concealer to disclose; or it may consist in *negligent misrepresentation* by one who undertakes, without due investigation, to direct the judgment and guide the conduct of other persons who rely upon his counsels, and are thus misled by him into errors which occasion loss; or it may consist in *breach of trust*, which is the violation of a confidence prudently and lawfully reposed by one person in another either as the result of a contract, or of a legal relationship, or of the natural or accidental dependence of one upon the other. In many wrongs fraud may be the equivalent of force, by inducing a consent or preventing a resistance to unlawful conduct; but its principal operation is in the sphere of contracts, where it contaminates every agreement into which it enters and renders it void at the option of the defrauded party. *Conspiracy* is the combination of two or more persons against a third person to injure him in his personal, property, or family rights, by committing against him some unlawful act or some lawful act in an unlawful manner. Any wrong whatever, whether involving force or fraud or even

a mere neglect of duty, may be the subject-matter of a conspiracy. A casual *coincidence* of will and effort is not conspiracy; there must be a concert of intention and endeavor; since it is on account of the accumulation of hostile energy against a single individual that the law takes notice of a conspiracy as a wrong additional to that contemplated by the combination, and as in itself an efficient cause of loss and damage. *Negligence* is the failure to perform a legal duty. It may consist in entire inaction, or in the insufficient and injurious performance of a lawful act. It may be intentional or unintentional. Where the neglected duty requires only the exercise of a slight degree of care, like that of the depositary of a chattel, the negligence involved in its omission is called *slight negligence*. Where the duty demands the exercise of ordinary care, like that of a pledgee, the corresponding neglect is *ordinary negligence*. Where the law attaches to the duty an extreme care, like that of a common carrier of merchandise, the failure to perform the duty is *gross negligence*. Intentional gross negligence is *wanton negligence*, and is often punished as a crime.

READ: Rob. Am. Jur., §§ 139, 140;
Andrews, American Law, §§ 653–656, 659, 813–815;
Clark, Elementary Law, §§ 111, 116, 124;
Cooley on Torts, pp. 60–62, 124–126, 473–506, 630, 631;
Jaggard on Torts, §§ 187–194, 205–207, 246–269.

§ 198. Of the Causal Relation between Injuria and Damnum.

In every private wrong not only must the *injuria* and the *damnum* concur, but the *injuria* must also bear to the *damnum* a true and evident *causal relation*. Their coincidence in point of time and place is not enough, nor yet the fact that they are so connected that the *damnum* would not have occurred unless the *injuria* had been committed. It is necessary that the *damnum* should be the *natural and proximate consequence* of the *injuria;* that is, that according to the ordinary experience of mankind the *damnum* might have been expected, under all the circumstances, to have resulted from the unlawful act. But a *damnum* which is remote and improbable, or which arises from the intervention of contingent secondary causes or from the subsequent conduct of the injured party, is not so related to the *injuria* that their concurrence constitutes a private wrong. Where the *injuria* is a mere breach of contract the *damnum* embraces only those consequences of the breach which the

parties to the contract may be supposed to have foreseen, when the contract was made.

Rem. Possibly all events occurring in the universe may have some dependence upon one another, so that none of them would ever happen unless all the others had been or were about to be, and thus the relation of cause and consequence may subsist between each of them and every other. But human responsibility cannot be measured by such standards; and when the law attempts to fix it, as of course it must, the causal relation which it recognizes must be limited within bounds which are definite and easily discerned, and which guard the rights both of the injured and the injurer. According to the universal dictates of justice and reason every person may safely act in view of the natural and probable consequences of his conduct. A narrower rule would make it utterly unsafe to act at all; and hence the law refuses to hold any one responsible except for those proximate results of his wrongdoing which, in the light of ordinary human experience, a prudent man would have expected to occur.

READ: Broom, Com., pp. 95–98;
Barbour, Rights of Persons and Property, pp. 760, 761;
Andrews, American Law, § 657;
Clark, Elementary Law, § 100;
Addison on Torts, § 33;
Cooley, on Torts, pp. 68–80;
Pollock on Torts, pp. 29–57;
Jaggard on Torts, §§ 22–26;
2 Greenleaf, Evidence, §§ 253–278.

§ 199. Of the Classes of Private Wrongs.

As every private wrong is the invasion of a private right the logical classification of private wrongs corresponds with that of private rights, dividing them into: (1) Wrongs against Personal Rights; (2) Wrongs against Property Rights; and (3) Wrongs against Family Rights. These classes further subdivide into various species of wrongs against the different personal, property, and family rights. Another classification of private wrongs, based on the form of the remedy which the law affords for their violation, is into Torts and Breaches of Contract. This classification was once accurate and has exercised great influence over the doctrine both of wrongs and remedies, but has become obscured by the legal recognition of new wrongs and the introduction of new remedies until it

no longer serves to separate private wrongs into two distinct and well-defined groups.

Rem. In ancient times the common law attempted to redress but two classes of private wrongs; those consisting in acts of *violence,* and those arising from *breach of contract;* and for each of these it provided different modes of remedy. The former class became known as *torts,* because involving elements of wilful wrong not necessarily embraced in a mere failure to perform a contract; and thus there grew up a law of torts covering both wrongs and remedies *ex delicto,* and a law of contracts governing wrongs and remedies *ex contractu.* Later, in 1285 A. D., wrongs committed without violence, such as negligence and fraud, were by statute admitted to the rank of actionable wrongs, and provided with a remedy similar to those already applied to torts; and as many of these new wrongs might be breaches of contract as well as torts, and could thus be redressed also in actions *ex contractu,* the distinction between the wrongs as belonging to different classes was gradually diminished, while that between the remedies remained until the ancient forms of action were superseded by the *"New Procedure"* introduced in the last century by statute. Notwithstanding these changes, however, a very large proportion of those detailed rules governing wrongs and remedies which are now in force were elaborated and established while these distinctions prevailed, and the learning of the law concerning them is by no means rendered obsolete by the apparent merger of these classes into one another.

READ: Rob. Am. Jur., §§ 143–145;
Cooley on Torts, pp. 2–4, 90–96;
Pollock on Torts, pp. 1–6, 644–646;
Jaggard on Torts, §§ 1–9.

CHAPTER I

OF PRIVATE WRONGS AGAINST PERSONAL RIGHTS

§ 200. Of the Species of Private Wrongs against Personal Rights.

Private wrongs against personal rights invade the rights of personal security and personal liberty. They prevent or curtail the legal enjoyment of life, limbs, body, health or reputation; or hinder that normal freedom of action which the law guarantees to every citizen. Those which infringe the right to *life, limbs, and body* are of two species: (1) Threats; and (2) Violence. Those which attack *health* are of various kinds, embraced under one common species called Nuisances to Health. Those which invade the right to *reputation* are of three species: (1) Libel; (2) Slander; (3) Malicious Prosecution. Those which obstruct *freedom of action*, by direct interference with the person, are known as False Imprisonment. Those which *indirectly restrain personal liberty* are forms of fraud, conspiracy, attacks on reputation, property or person, or invasions of family rights.

Rem. A single wrongful action or omission may sometimes infringe several private rights, and thus entitle the sufferer to several private remedies. Thus the slander of a servant may not only impair his reputation, but also deprive him of the opportunity to labor, and thus affect his liberty of contract. Or a false imprisonment may involve violence against the body as well as a privation of personal liberty. Sometimes these injuries are sufficiently distinct to permit a separate remedy to be pursued for each; in other cases they so merge in one another that the injured party by selecting one remedy relinquishes the others.

READ: Cooley on Torts, pp. 24–29;
Pollock on Torts, p. 7.

SECTION I

OF PRIVATE WRONGS AGAINST THE RIGHT OF PERSONAL SECURITY

§ 201. Of Threats.

A *threat* is the manifestation by one person of an intent to do unlawful violence to another. This intent may be manifested by words or actions; when by words it is called a Menace; when by actions it is known as an Assault. A *menace* is an oral or written declaration of a purpose to inflict unlawful corporal injury upon another. An *assault* is an intentional attempt to inflict immediate unlawful violence upon another, by one who has the apparent present ability to render the attempt successful. Thus a wrongful endeavor to strike another who is within striking distance, if the endeavor fails, is an assault. The unlawful *intent is presumed* from the wrongful endeavor unless other circumstances indicate its absence; as where the apparent effort is accompanied by declarations showing that the supposed assailant does not intend his blow to take effect. But to couple with the threatening act an offer to refrain from violence, if the victim will perform conditions which the assailant has no right to impose, does not rebut the presumed intent, nor prevent the threatening act from being a complete assault. An assault may be committed not only by striking, but by any other act whose natural and direct consequence, if uninterrupted, would be the infliction of a legal injury upon the body of the person attacked.

Rem. From an assault the law implies damage, and hence an assault is always a wrong and is, therefore, actionable. But the law implies no damage from a mere menace which, though it may be a crime because it disturbs the public peace, does not become a private wrong unless it causes actual loss to the party menaced, as by deterring him from pursuing his ordinary business.

READ: 3 Bl. Com., p. 120;
Addison on Torts, §§ 115, 116;
Cooley on Torts, pp. 29, 160, 161, 506;
Pollock on Torts, pp. 249–258;
Jaggard on Torts, § 148.

§ 202. Of Violence.

Violence is the unlawful forcible infliction of physical injury upon the person of another. It is of *four degrees;* (1) Battery; (2) Wounding; (3) Mayhem; and (4) Homicide. *Battery* is any intentional wrongful act of one person, whereby either he or his instrument of wrongdoing is brought into contact with the limbs or body of another, or with some object so connected with his body as to be, for the time being, legally identified with his person. A *negligent* or *accidental* touching of another is not a battery, unless the negligence is so gross as to be the legal equivalent of intentional violence. A *wounding* is a battery producing some serious and dangerous lesions of the tissues of the body. A *mayhem* is a battery which deprives its victim of a limb or of its use, thus rendering him less able to defend himself or annoy his adversary. A *homicide* is an action or omission which causes the death of another.

Rem. The *person* of an individual extends beyond the confines of his bodily frame to other objects, so connected with it that the security of the person necessitates the protection of these also. Thus to strike the clothing which he wears, or the horse which he rides, or the cane which he carries, is a battery; and like every other form of violence, however slight, is actionable. A *homicide* was formerly regarded as not the subject of an action because the victim, being dead, could not himself pursue his legal remedy, and no other person had sustained an injury for which an action would lie. But modern rules permit his legal representatives to recover damages for the pain he suffered from the injury before his death; and, in some States, even for the loss of life itself. The *consent of the injured party* to the violence does not excuse the offence of the wrongdoer, since the right of personal security is one which its possessor cannot waive in favor of the perpetrator of an unlawful act; but after the act has been committed the victim may release him from his liability for damages.

READ: 3 Bl. Com., pp. 120, 121;
Clark, Elementary Law, § 106;
Addison on Torts, §§ 117–126;
Cooley on Torts, pp. 162–169;
Pollock on Torts, pp. 185–191, 247–249;
Jaggard on Torts, §§ 149–151.

§ 203. Of Nuisances to Health.

A *nuisance to health* is any unlawful act or omission of one person, not amounting to actual or legal violence, whereby the health or comfort of another person is impaired. The *injurious influence of the nuisance* may be exerted directly on the body, or indirectly through the mind or moral sensibilities, but it is essential to the wrong that the physical organism be affected to some degree. The *forms of this injury* are numberless. Disturbing noises, indecent spectacles, disagreeable odors, objects or actions exciting reasonable apprehensions of immediate danger, the pollution of drinking water, the adulteration of foods, the contamination of the atmosphere by poisonous vapors, are a few among the many methods by which this wrong is perpetrated.

Rem. A strictly lawful action or omission cannot be a nuisance, whatever its injurious effects may be upon the health of persons. Thus where the State enjoins an act or forbearance in the interest of the people whom it governs, those individuals who suffer from it in health or comfort sustain no legal injury, since private welfare must yield to the public good. But an act, which would be lawful if it did not prejudice the health of others, may become unlawful from the mere fact that harmful consequences follow its commission; as where a noisy or offensive trade established in a desolate region is lawful while the neighborhood remains uninhabited, but becomes a nuisance with the influx of a settled population whose peace and health it seriously disturbs.

READ: 3 Bl. Com., pp. 122, 123;
Clark, Elementary Law, § 123;
Addison on Torts, §§ 370–375;
Cooley on Torts, pp. 565, 566, 596–627;
Pollock on Torts, pp. 484–491, 499–508.

§ 204. Of Libel.

A *libel* is the wilful and malicious publication, in a permanent and visible form, of some matter tending to injure the reputation of another. *Libellous matter* includes anything which naturally produces an impression derogatory to the character of the person libelled, or disgraces or degrades or renders him ridiculous in the eyes of others, or in any way impairs his social standing. Such matter is in *libellous form*

when expressed in writing, printing, signs, effigies, pictures, or any other persisting method which conveys the libellous ideas. Libellous matter is *published* when it is communicated to a single person other than its author, or when it is printed in a book or paper prepared for circulation. *Malice* is an essential ingredient in libel, but is presumed from the fact of publication unless the published matter be a privileged communication. Libel is always an *actionable wrong*, for the law implies damage if none in fact exists; and every person who participates in it, whether as author, publisher, or distributor, is liable for all the loss occasioned by it to the injured party. In suits for libel the publisher may prove, if he can, the truth of the libellous matter; in some States as a complete *justification* of his act; in others, as rebutting the presumption of malice or in *mitigation* of damages.

Rem. A *privileged communication* is a communication which the publisher has a legal right to make, whatever may be its character or its effect upon other persons. Thus the allegations in pleadings in civil cases or in an indictment in a criminal case; statements in public journals, concerning matters of public interest, made in good faith, and without actual malice, from personal knowledge or on apparently reliable information; confidential disclosures, without actual malice, of matter which the publisher has reasonable ground for believing to be true, and which it is his duty to impart to the readers for the protection of their lives or property, — fall within the class of privileged communications. But a communication made with actual malice is never privileged, unless made in the discharge of an official duty.

READ: 3 Bl. Com., pp. 125, 126;
Clark, Elementary Law, § 110;
Addison on Torts, §§ 153, 154, 164–214;
Cooley on Torts, pp. 193–195, 204–220;
Pollock on Torts, pp. 286–289, 304–347.

§ 205. Of Slander.

Slander is the wilful and malicious publication, by spoken words, of some matter tending to injure the reputation of another. *Slanderous matter* is of two kinds: (1) Matter *actionable per se*, from which the law implies damage and for which a legal remedy is always available; (2) Matter *not actionable per se*, from which the law does not imply damage, and which is never

actionable unless uttered with express malice and causing actual loss to the person slandered. *Four species* of slander are actionable *per se:* (1) Those which charge a crime involving grave moral turpitude, or punishable with a degrading penalty; (2) Those which impute an infectious disease, rendering its victim obnoxious to society; (3) Those which tend to injure the credit of a person in his trade or profession, by charging him with a want of that ability, integrity, or financial responsibility which are necessary to its safe and successful direction; (4) Those which assert that the incumbent of an office, to which pecuniary emoluments are attached, is unfit for his position. From the utterance of words slanderous *per se malice is always presumed* unless, as in the case of libel, the communication was privileged; words not slanderous *per se* raise no presumption of malice, and will not sustain an action unless the malice is affirmatively proved. *All persons engaged* in the promulgation of a slander, whether as authors or repeaters and whether believing in its truthfulness or not, are liable for the injury which their utterance of it may occasion. In actions for slander the *defendant may justify* his conduct by proving the truth of the accusation he has made; or may show his reasonable belief in its truth to relieve himself from the infliction of punitive damages.

Rem. To constitute a malicious publication the derogatory words must have been spoken with an apparent *intention to defame* the person to whom they refer, and must have been so understood by the hearers. Thus words of *abuse* ejaculated in the heat of passion during a quarrel, and not regarded by the auditors as an attack upon the reputation of the party to whom they were addressed; or words spoken in fun; or words not comprehended by the hearers; or words taken by the hearers in an evil sense when they are equally open to a harmless interpretation which was the one really intended by the speaker, — are not slanderous, though they might have been so if uttered with a different purpose and intent.

READ: 3 Bl. Com., pp. 123–125;
Clark, Elementary Law, §§ 110, 112;
Addison on Torts, §§ 153, 155–163;
Cooley on Torts, pp. 195–204;
Pollock on Torts, pp. 289–304;
Jaggard on Torts, §§ 165–182;
2 Greenleaf, Evidence, §§ 410–429.

§ 206. Of Malicious Prosecution.

Malicious prosecution is the malicious preferment against another of a groundless criminal charge, without probable cause and to his actual damage. A *groundless criminal charge* is one the prosecution for which terminates in favor of the accused, either by a verdict of acquittal or by the voluntary act of the public prosecutor. A *want of probable cause* exists unless the complainant had personal knowledge of such facts as would have led a reasonable and prudent man to believe in the guilt of the accused. *Malice* may be inferred from the want of probable cause, but this inference may be rebutted by proof that the complainant acted in good faith and upon the mistaken conviction that the charge was true. An *actual loss of reputation* occurs when the charge is preferred and the prosecution instituted, although the complaint may not be pressed nor any interference with property or liberty result. The preferment of an accusation, whose truth is demonstrated by a *subsequent conviction*, is not an actionable wrong, whatever may have been the malice or the motive of the accuser.

Rem. It is the interest of the State that criminals should be punished, and hence when private persons give information of supposed offences to the proper officers the law protects them against liability to the accused, unless the complaint was prompted by malice, was without foundation, was unsupported by probable cause, and has produced actual injury to the accused in his person, property, or reputation. A malicious and *groundless civil action*, entailing loss to the defendant, is often classed with malicious prosecution as a violation of personal and property rights; but in its nature it is a distinct private wrong, and in some States is made actionable by special statutes.

READ: 3 Bl. Com., pp. 126, 127;
Clark, Elementary Law, §§ 113, 114;
Addison on Torts, §§ 215–229;
Cooley on Torts, pp. 180–192;
Pollock on Torts, pp. 392–401;
Jaggard on Torts, §§ 195–204;
2 Greenleaf, Evidence, §§ 449–459.

SECTION II

OF PRIVATE WRONGS AGAINST THE RIGHT OF PERSONAL LIBERTY

§ 207. Of False Imprisonment.

False imprisonment is the unlawful forcible detention of another. Every confinement or restraint of the person in any manner, or in any place, or for any period of time is an *imprisonment;* and is *unlawful* in every case where it is not expressly authorized by law. Even when authorized by law it is unlawful unless it be in the mode, in the place, in the degree, and at the time prescribed by law. *All persons* procuring or voluntarily aiding in a false imprisonment are *responsible* for the injury; and where no actual damage can be proved the law implies a damage from the imprisonment itself.

Rem. An imprisonment may be forcible without the application of *direct* force to the person, provided it involves a physical restraint. Thus to lock the person in a building, or obstruct his passage in whichever way he wills to go, or transport him in a vehicle in a direction contrary to his choice, though no battery be committed against him, is an imprisonment.

READ: 3 Bl. Com., p. 127;
Clark, Elementary Law, § 107;
Addison on Torts, §§ 128–135;
Cooley on Torts, pp. 169–180;
Pollock on Torts, pp. 259–269;
Jaggard on Torts, §§ 141–147.

§ 208. Of Indirect Violations of Personal Liberty.

Personal liberty includes not only freedom of physical locomotion, but also immunity from interference in all lawful activities; and is therefore invaded by any conduct of one person which places an unlawful restriction upon the bodily or mental energies of another. Such a restriction may result: (1) From *fraudulent misrepresentations*, whereby persons are misled into actions and forbearances which, but for this mental coercion, they would never have performed and which subject them to personal hardship and privation; (2) From *conspiracies* directed against freedom of individual action, as in combinations to prevent other persons from engaging in a

lawful trade; (3) From *attacks on reputation*, property, or person calculated to deter their victim from pursuing any chosen enterprise; (4) From unwarrantable *interference with the wife* or child or servant of another, in order to deprive the husband, parent, or master of their assistance in carrying out his own designs.

Rem. This field of private wrongs is as yet but partially developed in detail; but the modern recognition of freedom of labor and capital as one form of personal liberty has compelled the law to treat as torts against the person many injuries which formerly were regarded merely as breaches of contract or invasions of family rights.

READ: Cooley on Torts, pp. 275–301;
Addison on Torts, §§ 6–8;
Pollock on Torts, pp. 283–285, 401–411;
Jaggard on Torts, §§ 204–207.

CHAPTER II

OF PRIVATE WRONGS AGAINST PROPERTY RIGHTS

§ 209. Of the Nature and Species of Wrongs against Property Rights.

Wrongs against *property rights* are wrongs which disturb the owner of property in the lawful acquisition, enjoyment, or disposal thereof. They may violate either the right of ownership or the right of possession, or both of these rights. Those which affect rights in *real* property are of *ten species:* (1) Disseisin; (2) Abatement; (3) Intrusion; (4) Discontinuance; (5) Deforcement; (6) Ouster; (7) Trespass; (8) Nuisance; (9) Waste; (10) Disturbance. Those which invade rights in *personal* property are of *six species:* (1) Asportation; (2) Detention; (3) Damage; (4) Conversion; (5) Breach of Contract; (6) Malicious Interference with Contract.

Rem. Property rights are rights of possession or rights of ownership. *Rights of possession* find expression in the use and enjoyment of the property, and are violated by every unlawful act or omission of another party which interferes with its control. *Rights of ownership* are legal relations which are not affected by the unlawful conduct of other persons, unless the subject of ownership is diminished in value or destroyed. But every wrong which diminishes the value or terminates the existence of an article of property at the same time violates possessory rights; and hence when ownership and possession reside in the same person the law regards such injuries as invasions of possession, and gives the owner his redress in actions suited to that form of injury. But where possession and ownership are temporarily separated, as where the ownership resides in a landlord or bailor while the possession vests in a tenant or bailee, a single wrongful act may constitute two injuries, one to the ownership, the other to the possession; and the owner and possessor both may have their proper legal remedies against the perpetrator of the wrong. This distinction is important in reference to many details of procedure.

READ: 3 Bl. Com., pp. 144, 167;
Addison on Torts, §§ 231, 262–278, 419–456, 546–553;
Cooley on Torts, pp. 355, 498–510;
Pollock on Torts, pp. 412–418;
Jaggard on Torts, §§ 208–210.

SECTION I

OF PRIVATE WRONGS AGAINST RIGHTS IN REAL PROPERTY

§ 210. Of Disseisin.

Disseisin is the unlawful entry of one person, under a claim of ownership, into the land of another and excluding the true owner therefrom. This injury can be committed only against a person who is already in possession of the land. The *entry* must be open, and with the actual or presumed knowledge of the true owner; and the occupation in which it results must be defined by limited and perceptible boundaries, so that the area to which the disseisor claims title can be clearly discerned by the real owner of the land. The *effect of such an entry* is to deprive the true owner of the seisin which is the symbol of his ownership, and to vest a seisin and apparent ownership in the disseisor which will continue until the actual owner re-enters and expels him. A *disseisin may be committed* by a stranger to the land, or by a tenant against his landlord, or by one co-tenant against another. *During the disseisin* the law regards the disseisor as the legal owner of the land, and upon his death intestate will transmit it to his heirs; and if he holds it until the right of the true owner to enter is barred by the Statute of Limitations he will himself become the owner of the land, under a title by adverse possession.

Rem. The attributes of a true and complete disseisin are identical with those predicated of adverse possession as a means by which title to land may be acquired. When set up by the disseisor as the foundation of his title, all these attributes must be alleged and proved. But to disseisin, considered as a wrong for which the owner of the land may bring an action, not all these attributes are necessary. Thus where a wrongful entry has been made, and it is doubtful whether the owner has been actually excluded, or whether the entry is with claim of title, he may treat the entry as a trespass or a disseisin at his election,

and sue to vindicate either his possessory rights or his right of ownership.

READ: 3 Bl. Com., pp. 167, 169–171, 188, 189;
1 Cruise Dig., Tit. I, §§ 33–35;
Kirchwey, Readings on the Law of Real Property, pp. 457–469;
Ante, § 120.

§ 211. Of Abatement: Intrusion: Discontinuance: Deforcement.

Abatement, intrusion, discontinuance, and deforcement are unlawful entries or occupations which exclude an owner who has *never had possession* of the lands. *Abatement* is the unlawful entry of a stranger into lands held in fee after the death of the true owner, and before the entry of his heir or devisee. *Intrusion* is the unlawful entry of a stranger into lands held in remainder or reversion, after the termination of the particular estate and before the entry of the remainderman or reversioner. *Discontinuance* is the wrongful occupation of lands held in fee tail, after the death of a tenant in tail, by a person to whom said deceased tenant in tail had unlawfully granted an estate for a longer period than his own life, thereby excluding the next heir in tail. *Deforcement* is any wrong withholding the possession of land, from the person entitled thereto by virtue of an estate of freehold, otherwise than by disseisin, abatement, intrusion, or discontinuance. Instances of deforcement are the refusal of the heir to allow the widow to take possession of her dower lands; of a grantor to deliver the granted premises to the grantee; of a tenant upon condition subsequent to surrender the land after the forfeiture of his estate therein.

Rem. Abatement and intrusion also differ from discontinuance and deforcement in that abatement and intrusion originate in a wrongful *entry*, while in the others the entry of the adverse holder was lawful. For this reason, the owner of the land may enter and expel an abator or intruder; but in cases of discontinuance or deforcement, as the *prima facie* right is in the occupant, the true owner is required to seek his remedy in an action at law.

READ: 3 Bl. Com., pp. 167–169, 171–174;
1 Cruise Dig., Tit. I, §§ 31, 32; Tit. II, ch. ii, §§ 6–9.

§ 212. Of Ouster.

Ouster is an unlawful entry into lands occupied by the tenant of an estate less than freehold, excluding him from their possession. Examples of this wrong occur where either a stranger or the landlord unlawfully ejects a tenant for years, or where creditors are wrongfully excluded from lands which have been set out to them in execution to be held until their revenues pay the debt.

Rem. Ouster in some respects resembles disseisin, and is often embraced in its general definition. But it differs from that injury not only in its legal history, but because the wrongdoer need not claim a title in himself; the injured party need not have a permanent interest in the land; the ouster works no transfer of the seisin; and the remedy is not a re-entry but an action to recover the possession together with the intermediate profits of the land.

READ: 3 Bl. Com., pp. 198, 199.

§ 213. Of Trespass Quare Clausum Fregit.

Trespass to land is the wrongful entry of one person into land which is in the lawful possession of another, without claiming ownership and without excluding the rightful occupant. It is called trespass *quare clausum fregit* because the law regards all private land as surrounded by a suitable enclosing barrier, whether or not such barrier in fact exists, and considers that the enclosure is broken into by violence whenever any one unlawfully enters on the land. From such an entry, however slight and transitory, the law also implies damage, and provides for it a remedy. Trespass *quare clausum* may be *committed by* the personal entry of the trespasser himself, or by the entry of his servants acting under his orders, or by that of an inanimate object projected by him into the land, or by that of his cattle or other animals when it results from his act or neglect. It can be committed by a stranger against the occupant, or by one tenant against his co-tenants, or by a landlord against his own tenant. But it can be *committed only against* a person who is in actual possession of the land or, where there is no actual possession, against the person who has the right of immediate possession.

Rem. Every entry into the land of another is unlawful unless made by his actual or implied license, or in pursuance of some legal right or privilege. An *actual license* is one expressly granted by the occupant of the land, and justifies any entry made within its provisions. An *implied license* arises by custom or by necessity, — as to save property from destruction, preserve persons from danger, reclaim property accidentally cast upon the land, or carry on the ordinary intercourse of social or commercial life. An *entry by legal right or privilege* is one made in pursuance of official duty, or in the exercise of a right not dependent on the consent of the possessor of the land. One who enters by legal right or privilege, if he exceeds or abuses his right while on the land, becomes a trespasser *ab initio*, and forfeits the protection of his privilege; but one who abuses an express or implied license is not technically a trespasser because he entered by the occupant's consent, though he is guilty of an actionable wrong.

READ: 3 Bl. Com., pp. 208–215;
Clark, Elementary Law, § 118;
Boone, Real Property, §§ 433–445;
Addison on Torts, §§ 367–369;
Cooley on Torts, pp. 355–392;
Pollock on Torts, pp. 419–424, 426, 427, 447–455, 457–480;
Jaggard on Torts, §§ 211–217.

§ 214. Of Nuisances to Real Property.

A *nuisance to real property* is any wrongful action or omission, not involving an unlawful entry, whereby the enjoyment of the property by its owner or possessor is impaired. Nuisances to land are of various forms, such as overhanging buildings, the discharge of drainage, the obstruction of watercourses, the excavation of supporting soil, or the production or collection of offensive substances on adjoining land. The unlawful interference, by the owner of the servient estate, with the use of an *incorporeal hereditament* appurtenant to land is also a nuisance, since it tends to diminish the enjoyment of the dominant land. Every *continuance of a nuisance* is an additional wrong; and any person omitting to remove a nuisance over which he has control, though he did not create it, is a wrongdoer and is responsible for the injury which it may occasion.

Rem. Many nuisances to land are also nuisances to the person by whom the land is occupied, and likewise may be nuisances to persons having no connection with the land. Thus an accumulation of noxious matter may be a nuisance to adjoining land impairing its rental value to the landlord; a nuisance

to the tenant prejudicing his health and diminishing his enjoyment of his possessory estate; and a nuisance to the passer-by destroying the comfort to which he is entitled in his use of the highway. Each of these nuisances is actionable in itself, although it has been doubted whether a nuisance prejudicing both property and health could be made the subject of an action at law on behalf of any person but the owner of the land. Modern remedies, however, seem to be available by any of the injured parties, separately from the others.

READ: 3 Bl. Com., pp. 216–219;
Addison on Torts, §§ 370–418;
Cooley on Torts, pp. 670–749;
Pollock on Torts, pp. 484–531;
Jaggard on Torts, §§ 232–245;
2 Greenleaf, Evidence, §§ 465–476;
Boone, Real Property, §§ 425–432.

§ 215. Of Waste.

Waste is any unlawful act or omission on the part of a particular tenant, who is in possession of the land, by which the estate of the remainderman or reversioner is diminished in value. It is of two kinds: (1) Voluntary Waste; and (2) Permissive Waste. *Voluntary waste* is the wilful act of the tenant, such as cutting down timber trees, destroying or altering buildings, or opening new mines or quarries. *Permissive waste* is the neglect of the tenant to protect the property from decay, or from wrongful injuries at the hands of strangers. Whether or not a given act or omission is waste is not now in this country defined by law, but by the current local standard of good husbandry. Waste *can be committed* by a tenant for life or years against the owner of the fee, but not by a tenant in fee simple against his heir, nor by a tenant in fee tail against the next donee, — each of these latter tenants being the owners of the entire inheritance. Waste has always been regarded by the law as a grievous injury, comprising not merely damage to property but a breach of confidence and the violation of a covenant; and hence the defaulting tenant may be sued at law, enjoined in equity, deprived of the possession by the appointment of a receiver, and formerly altogether forfeited his estate.

Rem. Acts and omissions of a *stranger* which, if committed by a tenant, would be waste are trespasses or nuisances against

the tenant though they also injure the reversioner; and it is the duty of the tenant to protect the land against them and to recompense the reversioner for the loss they may entail upon him. If the tenant refuses to discharge this duty the reversioner may sue the stranger in the name of the tenant and recover damages; and where the injury to the reversioner is separable from that inflicted on the tenant the reversioner may seek his remedy in a distinct action against the wrongdoer in his own name.

READ: 2 Bl. Com., pp. 281, 282;
3 Bl. Com., pp. 223–225;
Clark, Elementary Law, § 120;
Kerr, Real Property, §§ 664–704;
Pingrey, Real Property, §§ 323–339;
Rice, Real Property, §§ 160–169;
Boone, Real Property, §§ 113–120, 611–642;
Tiffany, Real Property, §§ 246–257;
Addison on Torts, §§ 425–434;
Cooley on Torts, pp. 392–396;
Pollock on Torts, pp. 427–431;
Jaggard on Torts, §§ 218–223;
2 Greenleaf, Evidence, §§ 650–656.

§ 216. Of Disturbance.

Disturbance is any wrongful act of one person by which another is disturbed in the lawful enjoyment of an incorporeal hereditament. Thus a *common of pasture is disturbed* when a stranger pastures his cattle in the common field, or when a commoner puts in more cattle than he ought, or when the owner of the field encloses it and excludes the commoners from its use. A *way is disturbed* whenever passage through it is wrongfully and wilfully obstructed. An *exclusive franchise is disturbed* by the inauguration of rival enterprises which reduce its profits.

Rem. Where the owner of the servient estate unlawfully hinders the enjoyment of an incorporeal hereditament appurtenant to land, the wrong is at the same time a *disturbance* to the incorporeal right, and a *nuisance* to the dominant land. But the two injuries are inseparable in measurement or remedy, and are consequently treated as a single nuisance.

READ: 3 Bl. Com., pp. 236–242;
Clark, Elementary Law, § 121;
Jones, Easements, §§ 872–891;
Boone, Real Property, § 148;
Addison on Torts, §§ 568–572;
Cooley on Torts, pp. 413, 431–441;
Pollock on Torts, pp. 456, 457.

SECTION II

OF PRIVATE WRONGS AGAINST RIGHTS IN PERSONAL PROPERTY

§ 217. Of Asportation and Detention.

Asportation is the unlawful taking of a chose in possession out of the control of the person in whom, at the time of the taking, the right of possession resides. It may consist either in the removal and destruction of the chose, or in its removal without its destruction. It can be committed against any one who has the lawful possession of the chose; and by any one, even its true owner, who has not the right to its immediate possession. As this wrong always involves force, or a fraud which is equivalent to force, it is a true trespass, and is often called *trespass de bonis asportatis*. *Detention* is the unlawful withholding of a chose in possession from the control of the person who is entitled to its immediate possession. It may be perpetrated by force or fraud or simple negligence; and may be committed by any person, even by the owner of the chose, and against any person who has, at the time, the right to its possession.

Rem. Every asportation includes a detention, more or less prolonged; but a detention may exist where the original taking was lawful or with the consent of the owner, as where a bailee wrongfully retains an article after the purpose of the bailment is accomplished. Where a detention originates in a *lawful taking* it is often necessary, in order to render the retention unlawful, and to fix the liability of the retainer, for the person entitled to the possession of the chose to *make demand* for it upon the retainer, and in such cases no action will lie for its recovery or for damages until the demand has been made, and the return has been expressly or tacitly refused.

READ: 3 Bl. Com., pp. 144–151;
Addison on Torts, § 518;
Cooley on Torts, pp. 510–516.

§ 218. Of Damage to Choses in Possession.

Damage to choses in possession consists in any unlawful action or omission whereby the choses in possession of another are rendered less valuable in themselves, or less useful to their

owner or possessor. It may extend to the entire destruction of the chose, or may diminish to any degree its quantity or quality. It *may be committed by* any person against the rights of the owner or possessor of the chose, and the owner or possessor can commit it *against* the rights of one another.

Rem. The wrongs which destroy or decrease the value of a chose in possession, without disturbing the possession, are of two classes: (1) Those in which the destruction or decrease in value *results directly* from the wrongful act of another; (2) Those in which such destruction or decrease *results indirectly and consequentially* from the wrongful act or omission of another. To the former class belong all injuries arising from the wrongful application of any degree of force to the object injured. These are in their legal nature *trespasses*, and are redressed in an action of trespass by the courts of law. To the second class belong all injuries resulting from *negligence*, or *fraud*, or from *secondary causes* which have been set in operation by a force which was wrongfully exercised but was not applied directly to the injured object, or from malicious slanders of the title or value of the property. These are not true trespasses because they lack the element of violent injury at the hands of the wrongdoer, but they resemble trespasses in their consequences and are, therefore, remedied in an action of trespass on the case. The particular wrongs embraced in these two classes are almost without number, and generally have no specific names.

READ: 3 Bl. Com., p. 153;
Clark, Elementary Law, § 122;
Addison on Torts, §§ 260, 261, 573–614, 794–817;
Cooley on Torts, pp. 260, 413–431, 442–497, 554–594, 791–837;
Pollock on Torts, pp. 22–57, 348–392, 532–643;
Jaggard on Torts, §§ 182–194, 246–278.

§ 219. Of Conversion.

Conversion is the unlawful usurpation by one person of dominion over the choses in possession of another. An *unlawful usurpation of dominion* over the choses of another includes an external action or omission, and an internal purpose or intent. The *external action* or omission may be an asportation or detention of the chose, or some damage inflicted upon it. The *internal purpose* is the intention of the wrongdoer either to deprive the owner or rightful possessor of the enjoyment of the chose, or to procure for himself or for a stranger some bene-

fit from its temporary control. The presence of this intent gives to the external act a different legal character, and entitles the injured party to seek his redress in an action of *trover and conversion*. Any person may be guilty of this wrong as against the rightful owner or possessor; the possessor may commit it against the owner by abusing or exceeding his own possessory rights; the owner may commit it against the lawful possessors by interfering for his own advantage with their possessory rights. Where a conversion consists in the *wrongful sale* of goods belonging to another, and the receipt of the price by the converter, the owner of the chose may waive the wrong, treat the converter as his agent in the sale, and on the *quasi*-contract thus arising may recover from him the entire price received.

Rem. An asportation, detention, or damage may be complete without any internal purpose, and may be the foundation of an action of trespass or trespass on the case according as the injury is direct or consequential. But in an action of *trover and conversion* the internal purpose must be proved, and if it is not apparent from the character of the external act, — as it may not be in cases of detention, — a *demand* must be made upon the wrongdoer for the return of the chose to the owner or possessor before the suit is brought; and if this demand is met with an unequivocal *refusal*, or an unexplained neglect of the wrongdoer to return the chose, the internal purpose to convert the chose is sufficiently demonstrated. But if the refusal is upon reasonable conditions in reference to proof of ownership, payment of expenses, and the like, the refusal is not unequivocal, and the demand must be repeated after the conditions are fulfilled.

READ: 3 Bl. Com., p. 152;
Clark, Elementary Law, § 119;
Addison on Torts, §§ 519–544;
Cooley on Torts, pp. 516–537;
Pollock on Torts, pp. 432–447;
Jaggard on Torts, §§ 224–231.

§ 220. Of Breach of Contract.

A *breach of contract* is any action or omission of one party to a contract or *quasi*-contract by which the other party is hindered or disturbed in the enjoyment of some property or privilege, to which by virtue of the contract he has become entitled

Any *express contract is broken* by the failure of either party to do or to refrain from doing the thing which he agreed to do, or not to do, in the manner, time, and place in which it was agreed to be done or not done. A *quasi-contract* or *implied contract* is broken by the failure of either party to fulfil the obligation which, by reason of the circumstances, the law has imposed upon him. Such failure is in itself, in the eye of the law, a wrongful act or omission, unless excused or justified by the conduct of the other party, or by the act of God or of the public enemy, or by the occurrence, without the fault of the contracting party, of events by which the performance of the contract is rendered inherently or legally impossible. From such failure the law always *implies damage,* even though the breach of contract actually results in benefit to the promisee.

Rem. Every contract and *quasi*-contract creates a chose in action, whether the contract be to render services, forbear a right, or transfer property; and when the property is transferred, the right forborne, or the services rendered, the chose created by the contract becomes a chose in possession and is as fully possessed and enjoyed by its owner as in the nature of things it can ever be. The non-fulfilment or breach of a contract is, therefore, the wrongful retention in action of a chose which should be vested in possession, and thus contains all the elements of a private wrong. Choses in action, other than contract rights and obligations, are usually choses in possession in the hands of the person by whom they are withheld from the owner or rightful possessor, and consequently are subject like other choses in possession to asportation, detention, damage, and conversion.

READ: 3 Bl. Com., pp. 153–166;
Cooley on Torts, pp. 334–354, 595–621, 750–790;
Pollock on Torts, pp. 644–687;
Jaggard on Torts, §§ 293–298.

§ 221. Of Malicious Interference with Contract.

Malicious interference with contract is the wrongful act of a stranger to the contract, preventing one of the proposed parties from entering into the contract, or procuring one of the existing parties to disregard its obligations. The *interference* may be by force, fraud, or persuasion, and may relate to any species of contract, whether concerning services or property. But it *must be malicious* and wanton; not in the usual course of

competition, nor in the exercise of rights growing out of confidential relations between the stranger and the party whose conduct he affects. Common examples of this wrong occur in the enticing away of workmen in order to embarrass their employer, and in the deterring of customers from trading with a merchant for the purpose of compelling him to yield to unwarrantable demands.

Rem. According to many modern decisions a malicious interference with contract is also a wrong against personal liberty, although its disastrous consequences fall especially upon present or prospective rights of property.

READ: Andrews, American Law, §§ 678–681;
Clark, Elementary Law, §§ 115, 117;
Cooley on Torts, pp. 325–333;
Pollock on Torts, pp. 401–411;
Jaggard on Torts, §§ 204–207.

CHAPTER III

OF PRIVATE WRONGS AGAINST FAMILY RIGHTS

§ 222. Of the Nature and Classes of Wrongs against Family Rights.

A *wrong against family rights* is an unlawful act or omission of any person, whether within or outside of the family relation, whereby any party to such relation is deprived of the full enjoyment of those powers and privileges which the relationship legally confers upon him. Classifying wrongs against family rights according to the relations whose privileges they invade they are the following: (1) Wrongs against the relation of husband and wife; (2) Wrongs against the relation of parent and child; (3) Wrongs against the relation of guardian and ward; (4) Wrongs against the relation of master and servant; (5) Wrongs against the relation of a family head and his dependants. Wrongs against those rights of the parties to a relation which subsist in them as *individuals*, independently of the relation, are wrongs against personal and property rights like those which have already been considered.

Rem. During the period when the family was regarded as the social unit, and the father as its ruler and representative, the rights of its members as *between themselves* were not recognized by law as requiring its protection; and the sole wrongs which it endeavored to redress were those committed by third parties against the rights of the family head in his dependants. Modern social theories have, however, compelled the law to abandon this position, and to treat the reciprocal rights of members of the family as subject to legal wrongs and entitled to legal vindication, and to award to inferiors in the relation compensation for the loss they may sustain from injuries inflicted by third parties upon their superiors. Not yet, indeed, has the law of wrongs and remedies taken possession of the whole field of family rights, and given to the inferior the same measure of relief which the superior has always been able to obtain; but it is steadily developing and

tends to place all members of the family on an equality as against third parties, and also to afford them adequate redress for the wrongs committed against them by one another.

READ: 3 Bl. Com., pp. 138, 142;
Clark, Elementary Law, § 108;
Cooley on Torts, p. 261;
Pollock on Torts, pp. 269–285;
Jaggard on Torts, § 154.

SECTION I

OF PRIVATE WRONGS AGAINST THE RELATION OF HUSBAND AND WIFE

§ 223. Of the Violation of the Rights of a Husband in and to his Wife.

The rights of a *husband* in and to his wife may be violated in four ways: (1) By her abduction; (2) By alienating her affection from her husband; (3) By criminal conversation; (4) By physical injury to her person. The *abduction of a wife* is the unlawful taking or detention of a married woman from the possession and custody of her husband. This wrong may be committed by taking away or detaining the wife by force or fraud; or by persuading her to abandon her husband; or by encouraging her to remain away from him by affording her shelter and support. The *alienation of the affection of a wife* consists of any conduct on the part of persons other than the husband, which is intended to and does diminish her confidence in and affection for him; and is thus calculated to endanger the stability of the marital relation, and defeat the purposes for which it was established. This wrong may be *committed* by female friends or even by the parents of the wife, and by any words or actions which may influence her feelings and turn them against her husband. *Criminal conversation* is the sexual knowledge of a married woman to the damage of her husband. This injury is complete even if the wife voluntarily concur in the sexual act, since she has no legal control over her person, and therefore no power to consent to its violation; but if the husband acquiesces in the intercourse by suffering his wife to live as a prostitute, or if their domestic companionship has been permanently and unconditionally severed before the inter-

course by their mutual agreement or the action of the courts, he sustains no wrong. The *physical injury of a wife* consists in the infliction upon her of any bodily harm, whereby her ability to render service to her husband is impaired. This wrong may be committed by violence or by negligence; or by aiding her in perpetrating injuries to herself, — as by furnishing her with noxious drugs; and though for the time being she is separated from her husband, if its consequences continue after her return.

Rem. A husband has a right to the presence and assistance of his wife in his household, and any wrongful interference with the enjoyment of this right by third persons, whether by removing the wife from the household or by impairing her ability to render him the customary assistance within it, is an injury to him for which he may recover damages. A husband also has a right to the mental companionship of his wife, to her affection for himself and to her active interest in all that concerns the welfare of his family; and any wilful and malicious diversion of her interests and affections to other objects, by third persons, is an actionable wrong. It is not essential to this injury that the wife should have been led to violate her marriage vows, or to desert her husband's household, or to bestow her affections upon another man; the wrong against the husband is complete when the malicious interference of third persons has deprived him of the loyal and exclusive devotion of his lawful wife. But if through his misconduct toward her he has given her a sufficient legal ground to desert him, other persons may afford her shelter and protection, provided this is done in good faith and not from malice toward the husband, although the result should be to wean her entirely from his household and companionship.

READ: 3 Bl. Com., pp. 139, 140;
Clark, Elementary Law, § 153;
Addison on Torts, §§ 635–639;
Cooley on Torts, pp. 261–268;
Jaggard on Torts, §§ 161–164 *a*.

§ 224. Of the Violation of the Rights of a Wife in and to her Husband.

The rights of a *wife* in and to her husband may be violated in two ways: (1) By the alienation of the affections of the husband; (2) By the physical injury of the husband. The *alienation of the affections of a husband* from his wife consists in any

wilful and successful attempts, on the part of third persons, to diminish the respect and devotion which the husband does and ought to entertain for a loyal wife. This wrong may be committed by malicious slander of the wife to the husband; by seducing him into a transfer of his affections to another woman; by promising him pecuniary benefits in consideration of his abandonment of her; or by any other conduct intended to deprive and actually depriving her of that supreme dominion in his heart to which she is both naturally and legally entitled. The *physical injury of a husband* consists in the unlawful infliction of such bodily harm upon the husband as deprives him of the power to afford her the protection and support which the law recognizes as her due. This wrong may be committed by violence or negligence, or by aiding the husband in perpetrating acts injurious to himself.

Rem. As has already been remarked the rights of a wife in and to her husband are still of imperfect definition, and correspondingly this field of legal wrong is limited. The courts, however, recognize that wives can suffer some injuries which demand redress, and among these that the malicious alienation of a husband's affection from his wife is a wrong of the same character and enormity as the alienation of a wife's affections from her husband. They do not as yet concede that a wife has a right to her husband's chastity, nor afford her a remedy against another woman with whom her husband has had sexual intercourse unless it is accompanied by a withdrawal of his affection from herself, although such intercourse is a sufficient reason for divorce. Nor do the courts regard the physical injury of the husband as a wrong against the wife to the same extent to which they recognize the physical injury of the wife as a wrong against the husband. At present, indeed, this recognition seems to be confined to *two cases:* (1) Where the death of a husband is caused by unlawful violence or negligence; (2) Where unlawful practices of another person, such as the sale of intoxicating liquors, have resulted in the disability of the husband to provide for the support of his wife. In these two instances, under the local statutes of many of our States, the wife can recover damages proportionate to the pecuniary loss she has sustained.

READ: 3 Bl. Com., p. 143;
4 Bl. Com., pp. 312–317;
Clark, Elementary Law, § 153;
Jaggard on Torts, § 163.

SECTION II

OF PRIVATE WRONGS AGAINST THE RELATION OF PARENT AND CHILD

§ 225. Of the Violation of the Rights of a Parent in and to his Child.

The wrongs by which the rights of a *parent* in and to his child are violated are three: (1) The abduction of the child; (2) The physical injury of the child: (3) The seduction of the child. The *abduction of a child* is the unlawful taking or detention of the child from the custody and control of its parent, or of some other person who stands to it *in loco parentis*. The taking or detention is unlawful unless done in obedience to legal process, or in the necessary shelter and protection of the child, or after a voluntary relinquishment by the parent of his right to its control. This wrong may be committed by force or fraud or persuasion, or by harboring a fugitive child with intent to encourage it in its disobedience. The *physical injury of a child* consists in any unlawful action or omission of a third person which inflicts bodily harm upon the child, and thereby causes to the parent either the loss of the services of the child or trouble and expense in its cure. The *seduction of a child* is the procurement of the carnal knowledge of the unmarried daughter of another, to the damage of the parent. The carnal knowledge may be procured by force or fraud or flattery or persuasion, and may be either with or without the daughter's consent. The unmarried daughter may be either a minor or an adult.

Rem. The legal injury inflicted on the parent by the foregoing wrongs is either the loss of the services of the child or the additional burden imposed upon him in its care and support. In cases of *abduction* this loss is measured by the value of the services of which the parent is deprived, and the expense entailed upon him in recovering the child; and in some instances by the mental suffering which its absence has caused him. In cases of *physical injury* to the child the measure of damages is the same as in cases of abduction, though where the injury results in the death of the child the local statutes of some States prescribe a definite amount of compensation. In cases of *seduction* no loss of service to the

parent is presumed, but evidence of any actual service is sufficient to support the parent's claim for damages, which may be of greater or less amount at the discretion of the jury. A parent who *connives* at the seduction of his daughter suffers no legal wrong; and if he is himself a person of evil life and corrupt example, or the character of the daughter for chastity is bad, the defendant may offer evidence thereof either to show such connivance or to mitigate the damages.

READ: 3 Bl. Com., pp. 140, 141;
Dwight, Law of Persons and Property, pp. 250–254;
Andrews, American Law, § 512;
Clark, Elementary Law, §§ 109, 163;
Addison on Torts, §§ 640–647;
Cooley on Torts, pp. 268–277;
Jaggard on Torts, §§ 156–160;
2 Greenleaf, Evidence, §§ 571–579.

§ 226. Of the Wrongs which Violate the Rights of a Child in and to its Parent.

The principal wrong, by which the rights of a child in and to its parent are violated, is the *physical injury of the parent*, whereby his ability to protect and support the child are actually impaired, to the loss and damage of the child. The right to bring an action to recover damages for such injuries at present rests entirely upon local statutes, though the principle which underlies it is contained in the law of nature, and received practical recognition in the customs of the common law.

Rem. The ancient *weregild*, paid by a homicide to the family of his victim, which in one form or another kept its place in English law until after the separation of this country from Great Britain, expresses the same principle which is embodied in these modern statutes.

READ: 3 Bl. Com., p. 143;
4 Bl. Com., pp. 313, 314;
Addison on Torts, §§ 648–651.

SECTION III

OF PRIVATE WRONGS AGAINST THE RELATION OF GUARDIAN AND WARD

§ 227. Of Wrongs which Violate the Reciprocal Rights of a Guardian of the Person and his Ward.

A *guardian of the person* stands to his ward to some extent *in loco parentis*, and to that extent possesses rights in the ward which the law recognizes and protects. These rights, like those of the parent in the child, are violated: (1) By the abduction of the ward; (2) By the physical injury of the ward; (3) By the seduction of the ward. Such rights and wrongs, however, are not necessarily of the same scope as those involved in the relation of parent and child. Thus the *abduction of a ward* is an injury to the guardian only when he is entitled to the custody of the child: the *physical injury of a ward* is not a wrong against the guardian unless the guardian is compelled at his own cost to employ methods for its cure; the *seduction of a ward* affects the guardian, not through her loss of chastity but on account of some actual privation which he suffers or some expense which he incurs. The *physical injury of a guardian* of the person gives the ward no right of action, unless it was dependent on the guardian for support by virtue of some other relation than that of guardian and ward.

Rem. A guardian of the person, as such, is not entitled to the services of his ward, and therefore does not sustain an injury through the loss of its services alone. But the more nearly his actual relations to the ward approach those of a parent, and impose upon him obligations to protect and support the ward, the more extensive are his remedies against third persons for their unlawful interference with his rights.

READ: 3 Bl. Com., p. 141;
Cooley on Torts, pp. 277–280.

§ 228. Of the Wrongs which Violate the Reciprocal Rights of a Guardian of the Estate and his Ward.

The rights of the *guardian of the estate* of a ward are violated by any wrongful interference of third parties with the estate while under his control. Out of the income of the estate he must support and educate the ward; and he must so manage the principal as to make it produce a present income, and also to preserve it for the benefit of the ward at its majority. Whatever wrongful acts prevent him from the proper discharge of these duties are injuries both to the ward and to himself, and entitle him to maintain any necessary form of action, either at law or equity, for protection and redress.

Rem. Wrongs against the estate of a ward in the hands of its guardian are injuries not only to the property rights of the guardian, but to his family rights also, since they interfere with the discharge of the duty of the guardian to use the property for the benefit of the ward during the continuance of the guardianship. Such wrongs therefore inflict a twofold injury upon the guardian, and a further injury upon the ward, for which the guardian may sue alone in his own name as guardian, or in the ward's name jointly with his own.

READ: 2 Kent Com., Lect. xxx, pp. 228–230.

SECTION IV

OF PRIVATE WRONGS AGAINST THE RELATION OF MASTER AND SERVANT

§ 229. Of the Violation of the Rights of a Master in and to his Servant.

The rights of a *master* in and to his servant may be violated in four ways: (1) By the abduction of the servant; (2) By the retainer of the servant; (3) By the physical injury of the servant; (4) By the seduction of the servant. The *abduction of a servant* consists in the unlawful taking or detention of a known servant from his master during the period of service. This wrong may be committed by force or fraud or persuasion, or by harboring a fugitive servant with intent to encourage him in withholding his service from his master. The *retainer of a*

servant consists in the hiring of the known servant of another into the service of the retainer, before his term of service with the former master has expired; or in refusing to restore to the master on demand a servant who has been innocently hired. The *physical injury of a servant* is the wrongful infliction upon him of any bodily harm which deprives the master of his services, or diminishes their value. The *seduction of a servant* is the procurement of the carnal knowledge of an unmarried female servant to the damage of the master. The essence of this injury is the loss of service to the master, caused by the physical or mental incapacity which results from the seduction. The mode by which the injury is perpetrated is immaterial so far as the master is concerned, as also are the violation of her chastity and the disgrace and sorrow falling upon her and her family.

Rem. As a general rule the four wrongs above described relate only to servants who belong to the classes of *apprentices and menials*, and who are therefore members of the master's family. To take or entice away an employee, who is bound to the employer only by an agreement to serve him, is one form of the wrong known as a malicious interference with contract. Whether the physical injury of a mere employee is such a wrong against the employer as to give him a right of action against the wrongdoer has been doubted; but has been affirmed in cases where the damage to the employer was immediate and irreparable. In ordinary cases the remedy of the employer is against the employee for his breach of contract, leaving the employee to recover from the wrongdoer damages for his personal injury, including the amount which his employer has recovered against him. For the seduction of a female employee the employer has no remedy except against the employee for her breach of contract, should a breach occur.

READ: 3 Bl. Com., pp. 141, 142;
Addison on Torts, §§ 616–633;
Cooley on Torts, pp. 282, 283;
Jaggard on Torts, §§ 155, 279–292.

§ 230. Of the Wrongs which Violate the Rights of a Servant in and to his Master.

The rights of an *apprentice or a menial* in and to his master are as definite and valuable as are those of the master in and to the servant, and the wrongs by which they can be violated may

be as disastrous to the injured party. To disable a master so that he can no longer give instruction or employment to the servant; to prejudice his mind against the servant thereby leading him to neglect or ill-treat the servant; to obstruct his business enterprises and compel him to discharge his servants, — are examples of the injuries which a servant may suffer through the unwarrantable conduct of third persons toward his master. Hitherto, however, the courts have taken little notice of such injuries, unless they involve a breach of contract on the part of the master against the servant, and thus give the servant a right of action against the wrongdoer for malicious interference with his contract relations. But there would seem to be no valid reason why the courts should not recognize the *privation of an opportunity to serve* as an injury equal to the *privation of service*, and afford to the servant as effectual a remedy for the former injury as they now give to the master for the latter in cases where no contract exists.

Rem. Where a servant is not only employed by his master, but derives his support in whole or in part from him, the relation which he sustains to his master, as a dependant toward his family head, gives him a right of action for injuries inflicted on the master which deprive the servant of such support.

READ: Andrews, American Law, §§ 679–681;
Ante, § 221.

SECTION V

OF PRIVATE WRONGS AGAINST THE RELATION BETWEEN A FAMILY HEAD AND HIS DEPENDANTS

§ 231. Of the Wrongs which Violate the Rights of a Family Head in and to his Dependants.

Where the *head of a family* occupies toward its dependent members the legal relation of a parent or master, their abduction, physical injury, or seduction affect his rights in the same manner, though not always to the same extent, as if he were their actual master or their natural parent. But where the dependants, though living in the same household, owe to the family head no

duty or service, and have no claim upon him for support and care in case of injury, the conduct of third parties toward them does not infringe his legal rights in them, however serious may be the consequences to themselves.

Rem. Thus where the grandfather of an illegitimate child received the child into his household and maintained it, he was held to be able to sue for its abduction though no otherwise related to it than as he stood to it *in loco parentis*. But where a girl lived in the family of her brother-in-law, having no contract relation to him though rendering some service in the household, it was held that he had no such rights in her as entitled him to sue for her seduction.

READ: Andrews, American Law, §§ 513–515.

§ 232. Of the Violation of the Rights of a Dependant in and to the Family Head.

Where the family head occupies toward the dependant neither the relation of husband, parent, guardian nor master, the sole right of the dependant in the family head is the right of *protection and support*. Where even this right does not exist, no wrongful conduct of third parties toward the family head can prejudice the rights of the dependant. But where the dependant is actually supported in whole or in part by the family head, and has a natural or legal right to the continuance of such support, any unlawful action or omission of other persons which impairs the ability of the family head to render such support is a wrong for which the dependants also have a remedy.

Rem. Where a wrong consists simply in a privation of support the nearness or remoteness of the relation is not material. Nor can the injury to his feelings, nor the loss of companionship nor of social rank, be considered. The pecuniary value to the dependant of the health or life of the family head is the only foundation of the right of action and the sole measure of damages.

READ: Clark, Elementary Law, § 125;
Cooley on Torts, pp. 283–324.

SECTION VI

OF PRIVATE WRONGS COMMITTED BY MEMBERS OF THE SAME FAMILY AGAINST ONE ANOTHER

§ 233 Of the Wrongs Committed by the Superior in a Relation against the Inferior.

Apart from cases in which a contract element enters into a relation it has been the *general policy* of the law not to notice wrongs committed by the parties against one another, unless the wrong constitutes a crime against the public, or would be an actionable tort between the parties if no relationship existed. It was presumed that the authority of the superior over the inferior would be reasonably exercised, and his duties toward the inferior would be faithfully discharged; and in the absence of gross abuse, or neglect amounting to a crime, the law gave no redress to the inferior against the superior for any violation of his family rights. Thus a wife had no redress against her husband for injuries inflicted upon her person, or for refusing to provide her with the necessaries of life, or for any misconduct derogatory to her health or reputation, or for any destruction or dissipation of her property, unless he thereby became liable to a criminal prosecution. A similar rule obtained in reference to wrongs committed by parents against their children, by guardians of the person against their wards, and by masters against their menials and apprentices. Modern ideas concerning the personal rights of inferiors have, however, modified these ancient hardships, not so much by curtailing the powers and immunities of the superior as by providing methods for the escape of the inferior from further injury, by granting a divorce to the abused or neglected wife, and by removing an oppressed child or ward or servant from the custody and control of the superior.

Rem. The policy of the law in denying rights of action to inferiors against their superiors in the cases above mentioned grew out of the conviction that the recognition of such rights would be fatal to that family peace and order which are so necessary to the well-being of society. Hence, the relief accorded to inferiors at

the present day is usually confined to methods which support family authority while protecting individual inferiors against further injury.

§ 234. Of the Wrongs Committed by the Inferior in a Relation against the Superior.

The refusal of a wife to render to her husband that obedience and service which form her portion of the marital obligation is in its nature a species of *treason*, and inflicts a vital injury upon the family rights of the husband. The rebellion of a child against its parent, or of a ward or servant against his superior, partakes of the same character and may equally imperil the family relation. Formerly, the law recognized the right of the superior to enforce the performance of the duties of the inferior by any reasonable method; but at the present day the legal authority of the husband to compel the wife to fulfil her obligations is generally denied, while the power of other superiors to regulate the conduct of their inferiors is restricted within almost prohibitory limits. The laws which have thus weakened family authority have established nothing in its place, to the great detriment of social order and the general relaxation of public morals.

Rem. Fortunately the increased recognition of the contract relation between family superiors and inferiors relieves society to some extent from the evils consequent upon the gradual disappearance of family authority. A husband cannot yet sue his wife for a breach of the marriage contract, but in certain extreme cases her misconduct is treated as a good ground for a dissolution of the contract itself. A parent cannot cast his disobedient child upon the public for support by refusing to provide for it himself, but he may usually transfer its custody to public institutions where it will be compelled to labor and obey. A guardian of the person may be relieved from further trouble with his ward by resigning his office, and a master may dismiss an unruly servant or bring an action against him for neglect of duty.

CHAPTER IV

OF TORT-FEASORS

§ 235. Of Sole Tort-Feasors.

No person can commit a wrong unless he is bound by the legal obligation which the wrong infringes. A contract can be broken only by one who entered into the contract at a time when he was legally qualified to make it. Hence *no wrong is committed* by infants, lunatics, married women, or persons under duress, when they fail to perform agreements made during their disability. But all persons are under legal obligation not to commit voluntary torts, and therefore every person who *commits a tort,* unless he acts under compulsion, is responsible for the injury, whether he be an infant or adult, married or single, lunatic or sane. Moreover, torts may be committed either by the wrongdoer directly or through his authorized *agent,* except in cases like criminal conversation or seduction, where the personal act of the tort-feasor is essential to the wrong. To render a *principal responsible* for the tortious act of his agent it is not necessary that he should command the wrong or be present at its commission; it is enough if he places the agent in such relations to third parties that they suffer injuries which would be otherwise impossible. *Corporations* may thus be liable for the torts of their officers and employees in the course of their employment, even when they act against the rules of the company by which they are employed. The *agent* who perpetrates the tort is not exempt from liability because he acts by order of his principal unless the wrong consists in a breach of contract by which the principal alone is bound. Again, a tort may be committed through the instrumentality of *animals* as well as men. When *cattle stray* into the land of other persons than their owner, their owner or custodian is responsible for the injury they inflict, unless the intrusion of the cattle is due to

the negligence of the owner of the land. A person who harbors *ferocious animals*, which he knows to be ferocious, is liable for any damage they may do to persons or property, though they never leave his premises; and if they wander on to other land he is responsible for the mischief they commit, although he had no previous warning of their vicious propensities. When one employs his animals to inflict an injury, as by setting his dog upon his neighbor's cattle, his act is a wanton trespass, and his liability is the same as if the injury had been maliciously committed by himself.

Rem. The liability of an infant for his personal torts is not lessened by the fact that he acted under the direction of his father, nor that of a lunatic because he was not capable of self-direction and control. A parent or guardian is not responsible for the torts of his child or ward, unless the ward or child was acting for him as his agent.

READ: Clark, Elementary Law, §§ 99, 101–103;
Addison on Torts, §§ 86–114;
Cooley on Torts, pp. 113–141, 397–412, 622–669;
Pollock on Torts, pp. 58–208;
Jaggard on Torts, §§ 11–21, 70–99;

§ 236. Of Joint Tort-Feasors.

Where several persons are jointly bound by a contract the breach of the contract by one or more of them is a *joint wrong* for which all are jointly liable; and all must be sued for the breach in a joint action, and if one pays the damages recovered he has a right to call upon the others to contribute their respective shares. But *joint tort-feasors* are individually liable for all the injuries committed in pursuance of the common enterprise, and may be sued separately or together, at the option of the injured party; and should one pay the entire damages he would have no claim against the others for any contribution. All persons advising the perpetration of a tort, or aiding and abetting its commission, may be treated as joint tort-feasors, though absent when the injury was inflicted.

Rem. These rules concerning the individual liability of joint tort-feasors do not apply to cases where the tort-feasors acted in good faith in the assertion of an apparent right, and were igno-

rant of their error until it was disclosed by the judgment of the court. In such cases the liability for the tort is joint, not several; and each tort-feasor must contribute his proportionate share toward the payment of the damages. In all cases of tort a *release* in writing under seal, granted to one of the wrongdoers by the injured party for a valuable consideration, enures to the benefit of all the tort-feasors alike, and operates as the discharge of all from further liability.

READ: Addison on Torts, §§ 82–85;
Cooley on Torts, pp. 142–183;
Pollock on Torts, pp. 230–233;
Jaggard on Torts, §§ 66–69, 115–118.

PART II — OF LEGAL REMEDIES

§ 237. Of the Nature and Classification of Legal Remedies.

A *legal remedy* is the necessary counterpart and complement of a legal right. A natural right becomes a legal right when the law undertakes to assert and enforce it by providing a remedy for its infringement. Hence the maxim *ubi jus ibi remedium* is strictly true: the *jus* being the legal right; the *remedium* being the method which the law provides for its protection. Legal remedies are divisible, according to *their effect*, into two classes: (1) Preventive; and (2) Compensatory. *Preventive remedies* anticipate a threatened wrong, and protect the legal right from violation. *Compensatory remedies* redress a violated right either by restoring the injured party to his former condition, or by awarding him some other benefit or privilege in lieu of that of which he has been deprived. Legal remedies are also divisible, according to the *authority* by which they are applied, into two classes: (1) Extra-judicial; (2) Judicial. *Extra-judicial remedies* are those which the parties to the injury may themselves apply, under the sanction of the law, but without the aid of a court of justice. *Judicial remedies* are those which the State, as the administrator of the law, applies through the agency of courts of justice.

Rem. Preventive remedies, when available at all, are practically efficacious. Compensatory remedies are always available but are frequently of no practical value, because the wrongdoer is unable to give the injured party the compensation awarded by the law. Extra-judicial remedies are relics of a social condition in which the law left injured parties to obtain redress for private wrongs by some method of reprisal or retaliation against the wrongdoer; and are still retained because in many instances no judicial remedy would be available or adequate. The *extra-judicial remedies* at present sanctioned by the law *are ten:* (1) Self-defence; (2) Recaption; (3) Entry; (4) Abatement; (5) Distress; (6) Accord and Satisfaction; (7) Arbitration;

(8) Retainer; (9) Remitter; (10) Lien. Of these the first five are forcible acts of the injured party; the sixth and seventh are joint acts of the injured and the injurer; the remaining three are the effect of the operation of the law upon the conditions and relations of the parties.

READ: Rob. Am. Jur., §§ 148–161;
3 Bl. Com., pp. 22, 23, 116;
Broom, Leg. Max., pp. 191–210;
Barbour, Rights of Persons and Property, p. 760;
Andrews, American Law, § 625;
Clark, Elementary Law, §§ 240, 241, 243–245;
Addison on Torts, § 60;
Cooley on Torts, pp. 21, 22, 45;
Jaggard on Torts, §§ 10, 27;
Perry on Pleading, pp. 11, 12.

CHAPTER I

OF EXTRA-JUDICIAL REMEDIES

§ 238. Of Self-Defence.

Self-defence is the act of a party forcibly resisting a forcible attack upon his own person or property, or upon the persons or property of those whom by law he has a right to protect and defend. The *degree of force* permissible in self-defence depends upon the force of the attack, and the object against which it is directed. When the *force used* in self-defence is *unnecessary* or *excessive* the party using it becomes himself a wrongdoer, and is liable for the injuries which his unnecessary or excessive force occasions. That the force properly employed in self-defence unavoidably disturbs the public peace, or accidentally injures third persons, does not render such force unlawful.

Rem. Every one may lawfully resist an attack upon the persons or property of his wife, child, or parent, or of any member of his immediate household. Every one may also lawfully interfere by force to prevent or repel a felonious assault upon a stranger. To *kill in self-defence* is lawful in order to prevent death or mayhem or serious bodily harm, provided no other method of resistance or escape appears to have been available, unless the defender has himself provoked the original attack; and even then if he has openly declined a further combat, and has retreated as far as he could do without increasing his own danger. One may also kill to *defend his property* against arson, burglary, robbery, and other violent felonious attacks; or in resisting a false imprisonment attempted without color of authority; but not in defending against mere misdemeanors or trespasses or nuisances, nor in endeavoring to escape from an arrest which is apparently legal or by a lawful officer, though the officer may be mistaken as to the identity of the defender. Whether the force used in self-defence was unnecessary or excessive should be judged by the conditions as they appeared to the person using the force at the time when the force was exercised, and not from any subsequent discovery that his danger was less than he then supposed.

READ: 3 Bl. Com., pp. 3, 4;
Barbour, Rights of Persons and Property, pp. 773–776;
Walker, American Law, § 263;
Clark, Elementary Law, § 241;
Boone, Real Property, § 412;
Addison on Torts, §§ 121–124;
Cooley on Torts, pp. 51, 165–169, 204, 345;
Pollock on Torts, pp. 201–205;
Jaggard on Torts, § 51;
Perry on Pleading, pp. 12–15.

§ 239. Of Recaption.

Recaption is the act of a party whose wife, child, ward, servant, or personal chattels have been unlawfully taken, or are now unlawfully detained from his possession, whereby he retakes them into his possession without the aid of legal process. This he may lawfully do wherever he can find them, provided he does not commit an assault upon the abductor or detainor, nor disturb the public peace, nor trespass on the property of any person who is not privy to the unlawful detention.

Rem. This remedy is available whether the abduction or detainer was perpetrated by force or by fraud. *Abducted property* can be recaptured as long as it can be identified, but not after it has been so incorporated with other property as to lose its separate existence. But where the abducted goods are merely commingled with other goods and can be severed from them, or the whole mass can be proportionately divided, this can be done by the recaptor; or if the original commingling was intentional as well as wrongful, and a separation is now impossible, the recaptor may appropriate the whole.

READ: 3 Bl. Com., pp. 4, 5;
Barbour, Rights of Persons and Property, pp. 776, 777;
Clark, Elementary Law, § 241;
Addison on Torts, § 542;
Cooley on Torts, pp. 50–56;
Pollock on Torts, pp. 469–472;
Perry on Pleading, p. 15.

§ 240. Of Entry.

Entry is the act of a party who has been wrongfully excluded from lands to the immediate possession of which he is entitled, whereby he regains possession without resorting to legal proceed-

ings. To render this remedy effective the claimant must go upon the land, or as near it as its occupants will permit, and there assert his claim. Formerly, he might enter *by force and expel* the intruder, but this was forbidden by the Act of 5 Richard II (A. D. 1381), and he must now pursue his remedy at law if the occupant resists his claim. Where the present occupation originated in a lawful act, as in cases of discontinuance and deforcement, or where the right of entry has been *tolled* or taken away by the descent of the lands from the original intruder to his heir, the only remedy of the claimant is by an action at law. The effect of an *entry is neutralized* by new acts of dominion on the part of the intruder, and the right itself is lost unless it is asserted and enforced by an action within the time fixed by the Statute of Limitations.

Rem. Entry may be the exercise of an undisputed right, as where a grantee takes possession of the granted land; or it may be a legal remedy against a completed wrong. In the latter case the act of entry must be open and unequivocal, and must convey to the unlawful occupant a definite knowledge of the claim under which it is made. Where several tracts of land in the possession of the same occupant are claimed by the same party, his entry upon one in the name of all will be sufficient. Where an entry does not result in the expulsion of the intruder it nevertheless vests in the claimant the seisin of the land, enabling him to create estates of freehold, maintain actions, and transmit the land to his own heirs by descent.

READ: 3 Bl. Com., pp. 5, 174–179;
Barbour, Rights of Persons and Property, pp. 777–779;
Clark, Elementary Law, § 241;
Addison on Torts, §§ 390, 391, 409, 421;
Cooley on Torts, pp. 57, 58;
Perry on Pleading, p. 15;
Washburn on Real Property, §§ 953–968;
Bolles, Important English Statutes, p. 21, ***Act 5 Rich. II.***

§ 241. Of the Abatement of Nuisances.

The *abatement of a nuisance* is the act of a party who is suffering from a nuisance to his person or property whereby he removes the cause of his injury. A nuisance may result from the commission of an unlawful act, or from the omission of a legal duty. A nuisance arising from the *commission of an un-*

lawful act, as by the deposit of noxious substances in a place where they cause injury to others, may be abated by the injured party after due notice to the wrongdoer and a request to him to remove it, provided it can be done without a breach of the peace, or an assault upon the wrongdoer, or damage to innocent third parties. In urgent cases, where life is in immediate danger, an abatement without previous notice and request is permitted. A nuisance arising from the *omission of a legal duty* is not ordinarily abatable, but in great emergencies where no judicial remedy can be at once obtained, and an irreparable loss is imminent, the injured party may fulfil the duty and avoid the injury. When a nuisance *affects the general public*, like an obstruction in a highway or a navigable river, any person who is likely to be incommoded by it may remove it. Every *abator of a nuisance acts at his own peril*, and is liable to a suit for damages if the alleged nuisance was a lawful action or omission, or was not abatable.

Rem. An abatement must be strictly confined to the cause of the injury, and the thing abated must be a nuisance at the time of the abatement. If the existence of the thing is the nuisance, the thing may be destroyed; if its use is the nuisance, the use alone may be prevented; if its location is the nuisance, its location may be changed so far, and so far only, as is necessary to remove the injury. In no case can the abator *appropriate to himself* the injurious substance under pretence of an abatement. Where the nuisance consists in an excess, which is inseparable from the lawful portion of the injurious act or omission, the whole may be abated.

READ: 3 Bl. Com., pp. 5, 6;
Barbour, Rights of Persons and Property, pp. 779–782;
Clark, Elementary Law, § 241;
Boone, Real Property, §§ 562–593;
Addison on Torts, §§ 58, 410–412;
Cooley on Torts, pp. 46–49;
Pollock on Torts, pp. 513–517;
Jaggard on Torts, § 245;
Perry on Pleading, p. 16.

§ 242. Of Distress.

Distress is the act of a party who has sustained some legal injury, whereby he seizes the goods of the wrongdoer, and

detains them until satisfaction has been made. This remedy was once of almost universal application, but is now generally confined to the collection of overdue rent, and of damages for injuries committed by trespassing cattle. In some of our States it has never been recognized; where it does exist, it is strictly regulated by statutes.

Rem. Where a *distress for overdue rent* is permitted by the local law, the landlord can apply the remedy only where there is an actual lease between himself and the tenant, in which a rent certain in amount and in time of payment is specifically reserved; and where he has a reversionary interest which is to take effect at the expiration of the lease; and where he levies the distress after the rent has become due and while the relation created by the lease between himself and the tenant still subsists. In making the distress he may *take any goods* which he finds upon the premises except the following: (1) Those which are not legally capable of ownership; (2) Those which are in actual use at the time of the distress; (3) Those which are necessary to maintain a trade; (4) Those which cannot be restored *in specie* after the claim is satisfied; (5) Those which belong to a stranger, and are on the land in the ordinary course of business; (6) Those which are in the custody of the law under a prior process; (7) Beasts of the plow, fixtures, agricultural implements, and tools necessary to the prosecution of some industrial occupation. The *seizure* must be made without a breach of the peace or an assault, and the goods when seized must be preserved from injury, and not used unless their use is essential to their welfare. Formerly, they were held by the landlord as a pledge until the tenant chose to redeem them by paying the rent. Under later laws they may generally be sold after due notice to the tenant; the surplus of the proceeds, after payment of the rent and expenses, being restored to him. A *distress of cattle damage feasant* may be made by the owner or occupant of the land into which they intrude, provided he has himself complied with all those provisions of the law which direct him to protect his land by suitable fences or otherwise, and provided also that the cattle can be seized by him while they are actually on the land. Cattle thus distrained must not be injured, nor used except for their own good; but must be taken to the *public pound*, and there detained by the pound-keeper until they are redeemed by their owner, or are sold after due notice to him or reasonable delay; and the proceeds must be used to satisfy the just demands of the distrainor and the surplus paid to their owner. Where there is no public pound the distrainor may keep them in his own enclosure until they are redeemed or sold.

READ: 3 Bl. Com., pp. 6–15;
Barbour, Rights of Persons and Property, pp. 782, 783;
Clark, Elementary Law, § 241;
Addison on Torts, §§ 59, 413–418;
Cooley on Torts, pp. 58–60;
Pollock on Torts, pp. 472–474;
Perry on Pleading, pp. 16, 17;
1 Parsons on Contracts, pp. 517, 518.

§ 243. Of Accord and Satisfaction.

An *accord and satisfaction* is the agreement of the injurer to give, and of the injured party to receive, some valuable service or thing as a compensation for the injury, followed by the actual giving and receiving of the stipulated service or thing. This remedy includes two parts: (1) The agreement or accord; (2) The performance of the agreement or satisfaction. The *accord* must be a new agreement, made by and between the parties to the controversy upon a new and adequate consideration beneficial to the injured party, and must cover the whole claim intended to be compromised, and must clearly define the service or thing which is to be given and received in satisfaction thereof. The *satisfaction* must be actual and complete, and must exactly correspond with the accord; no part performance or tender of performance answering the purpose. Until the service or thing agreed upon in the accord is given and received the controversy is still open, and either party may retract and insist upon his right to a judicial remedy. An accord and satisfaction obtained by the fraud or duress of either party is void.

Rem. All persons are at liberty to compromise their disputes, but in order to make the compromise effective it must comply with the foregoing rules. The *pecuniary value* of the stipulated service or thing is of no legal importance unless the claim is for a definite sum of money, and the thing to be given in satisfaction of the claim is money; for here no less sum than is actually due can be a satisfaction. But where the amount of the debt is disputed, or other considerations beside the payment of the debt enter into the agreement, — such as payment before maturity, or the settlement of pending litigation, or an agreement of the creditors of an insolvent debtor to accept a *pro rata* dividend of his assets, — the payment of a less sum than the actual debt may be sufficient.

READ: 3 Bl. Com., p. 16;
Clark, Elementary Law, § 241;
Addison on Torts, § 40;
Perry on Pleading, pp. 17, 18;
2 Parsons on Contracts, pp. 681–688.

§ 244. Of Arbitration and Award.

Arbitration and award is the agreement of the injurer and the injured to submit to the decision of a third person all questions concerning the alleged wrong, followed by the decision of the third person and the compliance of both parties therewith. This remedy contains three parts: (1) The submission; (2) The award; (3) The performance of the award. The *submission* may be by parol or in writing, and must specify precisely the question to be settled by the arbitrator, must appoint or provide for the appointment of the arbitrator, and must formally agree that his decision shall be final. In spite of this agreement, however, either party may *revoke* the submission at any time before the award is published, though by revoking it he may become liable to the other in a suit for damages. The *arbitrator* must, within a reasonable time after his appointment, hear the parties and their evidence, and investigate every question embraced in the submission, and decide it according to his sense of justice rather than by technical legal rules; and after the investigation is concluded he must in due season publish his award. The *award* must conform to the submission, must cover every question within the jurisdiction of the arbitrator, and must be clear and conclusive, leaving no part of the controversy open for future adjustment, but directing each party what to do and what to forbear. After its *publication* by the arbitrator it cannot be reopened for further hearing, nor substantially amended; but has the effect of a judgment, and binds the parties until it is performed or set aside by a judicial tribunal. The *performance of the award* completes the remedy and extinguishes the claim from which the arbitration has arisen. The refusal or *neglect* of either party *to comply* with the award renders him liable to an action at law or a suit in equity according to the nature of the duty which the award imposes upon him.

Rem. The *subject-matter* of an arbitration must be some claim which the law would recognize and enforce; and *the parties* must be the claimant or his legal representative and the person against whom the claim should be asserted. When the submission is revocable it is often coupled with the *mutual bond* of the parties obliging the one who revokes to pay a stipulated sum to the other. A *submission is avoided* by the death of either party or of the arbitrator; or by the marriage of a *feme sole* party; or by the judgment of a court deciding the controversy; or by the destruction of the subject-matter of the claim; or by its transfer to another party. Two or more persons may be chosen to act as arbitrators; and where an odd number are selected the odd one may serve to make a majority, or may act as an *umpire* to decide when the others constitute a tie. Two or more arbitrators cannot act separately but must meet and *act together*, and in presence of the parties after due notice to them of the time and place of hearing. They are *not liable for errors* resulting from ignorance and inadvertence, but are responsible for total neglect of duty, for corruption, and for fraud. Their award will not be *set aside* on account of its injustice or neglect of legal formalities, or mistakes in points of doubtful law; but for gross errors of fact, or misconduct of the arbitrators injurious to the parties, or departure from their own principles of decision, or disregard of the submission, a court of equity will declare it void, and prevent the parties from carrying it into effect. Besides this extra-judicial remedy it is the custom in some localities to establish an *arbitration by rule of court*, as a part of judicial proceedings, to investigate and decide certain questions of fact which are too intricate for the determination of a jury, and too prolix for the examination of a judge. These tribunals are governed by local statutes and rules of practice.

READ: 3 Bl. Com., pp. 16, 17;
Clark, Elementary Law, § 241;
Perry on Pleading, p. 18;
2 Parsons on Contracts, pp. 688–712.

§ 245. Of Retainer.

Retainer is the remedy which the law gives to a creditor who has been appointed executor or administrator upon the estate of his debtor, by virtue of which he retains out of the estate a sum sufficient for the payment of his debt in preference to other creditors of the same degree. This remedy was permitted because the law gave to the creditors who instituted suit a priority over all the others; while the executor or administrator could

not sue himself and would thus have been postponed to all the others unless the law gave him the right to pay his own debt before discharging theirs.

Rem. The same reasons would apply to guardians, trustees, and assignees in bankruptcy. Where, however, the law places all creditors of the same degree on an equal footing, and prescribes the payment of their claims *pro rata* without reference to priority of suit, the reason for this remedy disappears. Such is generally the rule in this country, and where it prevails retainer is practically unknown.

READ: 3 Bl. Com., pp. 18, 19;
Barbour, Rights of Persons and Property, pp. 784, 785;
Perry on Pleading, pp. 18, 19.

§ 246. Of Remitter.

Remitter is the remedy which the law gives to the rightful owner of a freehold estate in lands when having been ousted of possession, and having no right of entry without action, he afterwards has another and defective freehold estate with a right of entry cast upon him by the law without his own concurrence; whereby upon his entry under the defective title he is presumed to hold both his estate and his possession under his former and perfect title, while the estate existing under the defective title is extinguished. If, however, rather than vindicate his own title by an action, he voluntarily acquires the defective title with its right of entry, the law leaves him in the condition into which he has plunged.

Rem. This remedy rests upon the same reason as retainer, since after the estate and right of entry are cast upon the disseisee by the law he can neither enter on himself under his right of entry nor sue himself under his valid title, and thus were it not for the remitter the actual seisin would remain permanently separated from the true estate. This is a dilemma in which the law would not allow him to be placed by its own action, and hence unites in him the lawful seisin and the valid estate.

READ: 3 Bl. Com., pp. 19–21;
Barbour, Rights of Persons and Property, pp. 785, 786;
Perry on Pleading, p. 19.

§ 247. Of Liens.

A *lien* is the remedy which the law gives to a person who has in his possession the goods of another, upon which at the request of the owner he has expended money, time, or labor, whereby he retains the goods in his possession until he has been compensated by their owner. Such liens inhere in carriers, innkeepers, warehousemen, agisters and other bailees *operis faciendi*, in attorneys upon the papers and moneys of their clients, and in consignors upon goods in transit where the consignee becomes insolvent and the goods can be stopped before they reach the consignee. This remedy somewhat resembles a distress, though it involves no act of seizure. The retaining lienor, as such, has no right to sell or use the property; but between certain classes of principals and agents the agent in possession has a general lien upon the property to secure his balance of account, and unless his claim is settled within a reasonable time the agent may *sell* so much of the property as will satisfy his claim.

Rem. The remedy above described is generally known as the *common-law lien*. Besides this there are several other conditional interests in property called liens, such as (1) The *vendor's lien* upon land which continues until the vendee pays the stipulated price; (2) the *mechanic's lien* upon land and buildings for construction and repairs; (3) the *maritime lien* upon vessels in favor of material-men and artisans; (4) the *judgment lien* which rests upon the property of a judgment debtor until the judgment is satisfied; (5) the *tax lien* which vests in the government against taxed property until the tax is paid. These liens do not imply possession of the property to which the lien attaches, but require judicial action to render them effective. The *common-law lien*, on the contrary, is a complete remedy in itself; attaches only to articles in the possession of the lienor; is lost whenever that possession is voluntarily relinquished; extends only to the claim for expenditure or labor on the article retained; and is released by the acceptance of any other security for that amount, or by an original agreement to give credit until a future day. It exists whether or not the price of the service or expenditure was previously settled upon between the parties, and even though the property is by law exempt from execution.

READ: 2 Kent Com., Lect. xli, pp. 634–642;
Walker, American Law, § 252;
3 Parsons on Contracts, pp. 234–285.

CHAPTER II

OF JUDICIAL REMEDIES

§ 248. Of the Constitution and Jurisdiction of Courts.

A *judicial remedy* is a remedy applied by the State through the instrumentality of courts of justice. It presupposes a *controversy* between two or more parties, upon some question of law or fact which is formally presented to the court for its decision. It involves an investigation by the court of the question at issue; a *judgment* finally determining the question so far as the present controversy is concerned; and a proceeding of some kind to carry the judgment into practical effect. A *court* is thus a tribunal having power to hear, to judge, and to execute its own decrees; and this power is called its *jurisdiction.* A *court is composed* of one or more public officers in whom these powers reside. A fully constituted court includes a judge, a clerk, and a sheriff or other executive officer. It is the *duty of the judge* to preside over and direct the proceedings of the court, and to decide all questions of law or fact arising in the course of the proceedings. In the courts of common law, and in certain cases in the courts of equity, his investigations of questions of fact may be assisted by a jury. It is the *duty of the clerk* to make records of the proceedings, and to perform such ministerial acts as the proceedings require. It is the *duty of the sheriff* to serve the process of the court, to preserve order during its sessions, and to execute its judgments. *These officers constitute a court* only when they are in actual session for judicial purposes, at the time and in the place and manner prescribed by law. Proceedings at another time or place or manner, though in their personal presence, are *coram non judice* and void.

Rem. Courts are divisible into *various classes,* according to their *relative dignity and jurisdiction:* (1) Courts of record and courts not of record; (2) Courts of superior jurisdiction and

courts of inferior jurisdiction; (3) Courts of general jurisdiction and courts of limited jurisdiction; (4) Civil courts and criminal courts. A *court of record* is a court whose judicial functions vest in the tribunal as such, independently of the official power of the judges who preside in it, and whose judicial records import absolute verity and cannot be contradicted, nor be amended except by the court itself or by a writ of error or appeal. A *court not of record* is a court whose judicial functions attach to the person of the officer appointed to hold it, and whose records are not indisputable. A court of record is of higher dignity and authority, and usually of wider jurisdiction, than a court not of record. Whether any given court is of record or not of record is determined by the law which creates it. A *court of superior jurisdiction* is a court whose judgments are final, and which is presumed to have jurisdiction over all matters whereupon it undertakes to act. A *court of inferior jurisdiction* is a court from whose judgment an appeal or writ of error lies to a superior court, and in favor of whose jurisdiction no presumption exists. A *court of general jurisdiction* has judicial authority over controversies of various and indefinite species; and every controversy is presumed to be within its jurisdiction unless the law has placed it within the exclusive cognizance of some other court. A court of *limited jurisdiction* is a court whose authority is confined to certain species of controversies. A *civil court* is a court in which the redress of private injuries is sought through private actions brought by the injured party. A *criminal court* is a court before which the State prosecutes, in its own name, those persons who are accused of public wrongs. Courts in this country are also divisible into *two classes*, according to the governmental *authority* by which they are *established*, namely: (1) State courts; and (2) Federal courts. The *State courts* derive their authority from the individual States of the American Union, and differ in their number and relations in the different States. In every State, however, there is one supreme tribunal by which all questions of law may be finally determined, and one or more inferior courts in which all cases not within the exclusive jurisdiction of the Federal courts may be heard and decided. The *Federal courts* derive their authority from the Constitution of the United States and the Acts of Congress. These are (1) The *Supreme Court of the United States*, which has original jurisdiction over cases where an ambassador, or public minister, or consul, or a State may be a party, and appellate jurisdiction over certain classes of cases arising in the other Federal courts; (2) The *Circuit Court of Appeals*, having appellate jurisdiction over all cases arising in the inferior Federal courts, except such as are within the exclusive cognizance of the Supreme Court; (3) The *Circuit Courts* and *District Courts*, which have

original jurisdiction over numerous civil and criminal cases arising under the laws of the United States, or to which citizens of different States are parties; (4) The *Court of Claims*, having jurisdiction of claims against the United States which are based on contracts or statutes; (5) The *Courts of the District of Columbia*, which bear the same relation to that portion of the United States that the courts of the individual States bear to their respective sovereignties; (6) The *Territorial Courts*, through which are administered the laws enacted by Congress for the judicial government of the various Territories until their erection into sovereign States. The jurisdiction of the Federal courts is sometimes exclusive of, and sometimes concurrent with, that of the State courts; and when concurrent, if an action is first instituted in a State court it is there completed unless removed by proper legal methods to the Federal courts. Courts in this country are also divided, according to the *form of their proceedings* and the nature of the remedies which they are able to apply, into *seven classes:* (1) The *Courts of Common Law*, which are the ancient customary courts of Saxon England, and have jurisdiction over all actions to recover property *in specie* or damages for past injuries, and over other matters which by custom or statute have been placed under their control; (2) The *Courts of Equity*, which were introduced into England after the Norman Conquest and gradually perfected till the reign of James I, and take cognizance of cases to which the courts of common law could not apply a remedy adequate to the demands of justice; (3) The *Courts of Admiralty*, which are established in all maritime nations to determine controversies arising out of commerce upon navigable waters; (4) The *Courts of Probate*, which are created to supervise the settlement of the estates of deceased persons and insolvents, and sometimes for the appointment and direction of guardians of infants and incapables; (5) *Courts Martial*, having jurisdiction over offences committed by persons, connected with the army or navy, in violation of military laws; (6) *Military Courts*, having jurisdiction over offences against martial law in periods of public disturbance, when the ordinary courts are unable to perform their judicial duties; (7) *Provisional Courts*, which are established in conquered territory to preserve order and protect property until the usual operations of civil government can be resumed.

READ: 1 Bl. Com., pp. 339–357;
3 Bl. Com., pp. 23–29;
Rob. Am. Jur., §§ 304–364;
Andrews, American Law, §§ 626–630;
Cooley on Torts, pp. 1–6, 416–422;
Jaggard on Torts, §§ 39–41;
Perry on Pleading, pp. 20–36;
Maxwell on Pleading and Practice, §§ 1, 2, 16, 17, 908–925.

§ 249. Of the Incidental Powers of Courts.

Every court possesses certain *incidental powers* which are or may become necessary to the exercise of its jurisdiction. These are (1) The power to *make and enforce rules* for its own guidance and that of its officers and suitors; (2) The power to *keep records* of its own proceedings, and where they are incorrect to amend them: (3) The power to *appoint and remove subordinate officers;* (4) The power to *preserve order* during its sessions; (5) The power to *punish for contempt.* These powers are inherent in the court, and are exercised by the presiding judge or under his immediate sanction.

Rem. The *rules of a court* are the law of the court, and bind all persons over whom the court has jurisdiction, unless they are repugnant to the general law. The *records of a court* are presumed to be correct; but clerical errors in them may be amended, and mistakes of fact may be perfected or expunged, by the court of its own accord or at the request of the parties. The principal *officers of a court* are its clerks and bailiffs, whom it may ordinarily remove at pleasure; and its attorneys at law, whom it may disbar for cause after notice and hearing. A court may *punish as contempts* all conduct in its presence which is derogatory to its dignity or interrupts its proceedings, and all wilful disobedience to its lawful orders and decrees.

READ: Rob. Am. Jur., § 309;
Cooley on Torts, pp. 422–425.

§ 250. Of Civil Actions.

A *civil action* is the pursuit of a private remedy for a private wrong in a civil court. It includes all the proceedings involved in the institution, judicial investigation, and determination of a legal controversy, and in the enforcement of the judgment of the court against the parties. The proceeding by which it is instituted is called the *process.* The mutual formal allegations of the parties, in presenting their respective claims, are called the *pleadings.* The investigation by the court is the *trial.* Its decision is the *judgment* or *decree.* The proceedings by which the judgment is enforced is the *execution.* All these proceedings, taken together, constitute *the action;* and though varying somewhat in form in the different species of civil courts are substantially the same in whatever court the action may be brought.

Rem. Every action relates to some *subject-matter* out of which the controversy has arisen. This may be a wrongful act or omission, past, present, or prospective; or an article of property; and the judgment in the action may concern the disposition of the property alone, or may impose some personal obligation or restriction on one or both of the parties. An action brought for the sole purpose of disposing of an article of property, and not affecting other rights of the parties to the action, is called an *action in rem*, — such as a suit in admiralty against a vessel, or an action for the partition of land between its acknowledged owners. An *action in personam*, on the other hand, is instituted to affect the personal or property rights of the parties, and the judgment therein is binding upon them and their estates until it is satisfied. All actions not strictly *in rem* are actions *in personam.*

READ: Andrews on American Law, § 644;
Shipman on Pleading, § 1;
Waples on Proceedings in Rem, §§ 1–41, 133–139;
Foster's First Book of Practice, pp. 1–43.

§ 251. Of the Jurisdiction of Civil Courts over Civil Actions.

The *jurisdiction of a civil court* over a civil action depends upon its jurisdiction over both the subject-matter and the parties. Its *jurisdiction over the subject-matter* is fixed by law, and cannot be extended or limited by any act of the court or agreement of the parties. *Jurisdiction over the parties* depends upon the proper service upon them of legal process, or their voluntary submission without process to the authority of the court. All the proceedings and conditions which the law requires to bring a controversy within the jurisdiction of the court before which it is instituted, taken together, constitute the *jurisdictional facts;* and if any of these are wanting, every act of the court in reference to the action, except to refuse to entertain it, is *coram non judice* and void.

Rem. The *jurisdiction* of a civil court over a *subject-matter* is fixed by law; sometimes according to the residence of the parties; sometimes according to the location of the subject matter; sometimes according to its character as real or personal; sometimes according to its value; sometimes according to the form of the relief desired. *Jurisdiction* over the *parties* is usually conditioned upon residence and notice. Thus civil courts generally have no compulsory jurisdiction over the parties in actions *in personam*,

unless such parties are domiciled within the territorial jurisdiction of the court, or have been served with process within that territory. In actions *in rem*, where the property in question is seized in pursuance of proper process, the parties are presumed to be sufficiently within the jurisdiction of the court for all the purposes of the suit, without residence or notice, though it is customary to attempt to give them warning of the seizure through some form of publication under the direction of the court.

READ: Rob. Am. Jur., §§ 306–308;
Maxwell on Pleading and Practice, §§ 18–27.

SECTION I

OF ACTIONS IN THE COURTS OF COMMON LAW

§ 252. Of the Common Law Actions.

The *ancient courts* of common law took cognizance of no ordinary civil controversies except those arising from (1) The exclusion from land of its rightful freehold possessor; (2) The withholding of personal property from its true owner; (3) The forcible injury of persons or property; (4) The failure to pay a definitely ascertainable debt; (5) The breach of a contract under seal. In A. D. 1285 their *jurisdiction was extended* by statute to controversies arising out of (1) Injuries committed by negligence or fraud; (2) Wrongs against health or reputation; (3) The conversion of personal property without force; and (4) Breaches of contract not under seal. According to the customs of these courts each of these controversies had its peculiar *form of action* regulating its process, its pleadings, its trial, its judgment, and its execution; and the plaintiff was required to designate in the process, by certain *technical words*, what form of action he intended to pursue. This designation bound him to adhere to the special methods peculiar to that form of action in all his subsequent proceedings, even though he thereby lost his suit; or to abandon that action altogether and begin anew. From these technical words the form of *action took its name*. Of the ordinary forms of action, from time to time adopted in the courts of common law, the following still survive: (1) *Disseisin* or *Ejectment*, to recover the possession of real property; (2) *Replevin* or *Detinue*, to recover the pos-

session of personal property; (3) *Trespass,* to recover damages for the direct forcible injury of persons or property; (4) *Trespass on the Case,* to recover damages for negligence or fraud, or for injuries to reputation, or for other wrongs to person or property by indirect force resembling in their consequences the wrongs inflicted by direct force; (5) *Trover,* to recover damages for the conversion of personal property; (6) *Debt* or *Account,* to enforce the payment of a definitely ascertainable debt; (7) *Covenant-broken,* to recover damages for the breach of a contract under seal; (8) *Assumpsit,* to recover damages for the breach of a contract not under seal.

Rem. The technical words which indicate the form of action usually occur in the original writ immediately after the clause of summons, thus, — "then and there to answer to . . . *in a plea of trespass; in a plea of assumpsit*"; or whatever the action may be. Then follows the declaration, beginning, — "whereupon the plaintiff *declares and says,*" etc. Variation between these technical words and the cause of action set forth in the declaration was anciently fatal to the suit. In modern times, especially in States where the "*New Procedure*" has been introduced, the attempt has been made to substitute one general form of action for the old common law forms; but many of their peculiar features, growing out of the nature of the injury, are permanent in the law and still control the progress of the action.

READ: Barbour, Rights of Persons and Property, pp. 787–789;
Walker, American Law, §§ 264, 265;
Jaggard on Torts, §§ 6–9;
1 Chitty on Pleading, pp. 106–109;
Stephen on Pleading, §§ 52–61;
Perry on Pleading, pp. 38, 39;
Bliss on Code Pleading, §§ 1–10.

§ 253. Of Actions: Real, Mixed, and Personal.

The ordinary common law actions are frequently grouped into three classes: Real, Mixed, and Personal. A *real action* is one brought to recover the possession of land by a person who has a freehold estate therein. A *mixed action* is one brought to recover the possession of land, and damages for its dispossession, by a person who claims the right to its possession. A *personal action* is one brought to recover personal property *in specie,* or damages for any violation of a private legal right. *Personal actions* are

further grouped into two classes: Actions *ex contractu,* based on breaches of contract; Actions *ex delicto,* arising out of tort as distinguished from contract.

Rem. Real actions were formerly both numerous and important, but have now practically disappeared; the mixed action of disseisin or ejectment taking their place. The principal real actions were: (1) *Writs of entry,* brought by an alleged disseisee to recover his seisin; (2) *Writs of Assize,* brought to recover a possession wrongfully withheld; (3) *Writs of Right,* brought to vindicate a title in fee simple; (4) *Writs of Formedon,* brought to vindicate a title in fee tail; (5) *Writs of Dower,* brought by a widow to compel the heir to set out her dower; (6) *Writs of Right of Dower,* brought by a widow to compel the heir to correct an error in the assignment of her dower; (7) *Writs of Admeasurement of Dower,* brought by an heir against the widow to correct an excessive apportionment of dower. Such of these controversies as cannot now be determined in an action of disseisin are usually adjusted in courts of equity or in courts of probate.

READ: 3 Bl. Com., pp. 117, 118;
Andrews, American Law, §§ 652, 653;
Pollock on Torts, pp. 14, 15;
Chitty on Pleading, pp. 109–111;
Stephen on Pleading, §§ 65–74;
Perry on Pleading, pp. 40–48;
Shipman on Pleading, §§ 2–5.

§ 254. Of Mixed Actions: Disseisin or Ejectment.

The *action of disseisin or ejectment* may be brought for the recovery of any real property upon which an entry can be made, and of which a sheriff can deliver the actual possession; but not to recover an incorporeal hereditament or a personal chattel. It *will lie* in any case of wrongful occupation of land with the exclusion of the lawful occupant, whether his estate be personal or real; and against any person who wrongfully withholds the possession of land from the lawful tenant under a claim of right. It will *not lie* for a simple trespass; though where the trespass may produce irreparable injury if repeated or continued, and the lawful owner is in doubt whether the intruder claims a title to the land or not, he may treat the trespass as an entry and bring his action of ejectment. In this action, if the intruder entered under a claim of right, the plaintiff must recover, if at all, by the *strength*

of his own title, not by the weakness of the title of the defendant; for possession under a claim of title is good against all the world except the true owner. But where the defendant is a mere trespasser, not claiming title, proof of the plaintiff's peaceable possession at the time of the trespass is sufficient. The *defendant cannot set up* an equitable title in himself, nor when he is a trespasser can he claim a legal title in a third person, nor his own superior title if the plaintiff is his tenant and holds under the lease. The *judgment,* if in favor of the plaintiff, awards him the possession of the land; and the sheriff under the execution reinstates him and expels the intruder. This *judgment is conclusive* against any title claimed by or vested in the defendant at the date of the rendition of the judgment; but does not prevent him from acquiring a new title and making another entry on the land. The *damages* recovered by the plaintiff may be merely nominal, or may be commensurate with the rents and profits during the dispossession. If nominal, a further action of *trespass for the mesne profits* may be brought. When the defendant occupied the land under a reasonable claim of right, and in good faith made permanent improvements thereon, the laws of many States entitle him to compensation for the improvements, either absolutely or as a set-off to the claim for rents and profits.

Rem. During the period when real actions were employed for the recovery of land, by a freehold tenant, the action of ejectment was devised for the recovery of damages, by a tenant less than freehold, for his dispossession. This action was afterwards extended to cover all cases of dispossession, and to enable any lawful tenant to recover the possession of his land as well as damages for the intrusion of the defendant. In making this extension certain legal fictions were introduced, in order to adapt it to all cases of intrusion, which required a circuitous proceeding in the name of a fictitious tenant; but these fictions soon became mere formal allegations which the defendant was not permitted to deny. This extension and simplification of the action of ejectment has rendered a resort to real actions in cases of disseisin unnecessary.

READ: 3 Bl. Com., pp. 178–207;
Chitty on Pleading, pp. 209–220;
Stephen on Pleading, § 85;
Perry on Pleading, pp. 93–100;
Shipman on Pleading, §§ 22–24;
Boone, Real Property, §§ 456–494.

§ 255. Of Actions Ex Contractu: Assumpsit.

The *action of assumpsit* is brought to recover damages for the breach of a contract not under seal. Of this action there are two forms: General Assumpsit and Special Assumpsit. *General assumpsit* is the form employed in all actions on implied or *quasi* contracts, and on express contracts which have been so far performed that nothing remains but to pay money. *Special assumpsit* is the form required in actions for damages for the partial or total non-performance of express contracts, unless the sole claim of the plaintiff is for a definite and already ascertained sum of money; in which case a form of general assumpsit known as *indebitatus assumpsit* is the proper remedy.

Rem. The action of assumpsit is of an equitable character, and is intended to afford relief in every case of failure to perform a legal obligation which grows out of a valid promise, whether the promise be written or oral, express or implied, a true contract or a *quasi* contract, provided it is not created by a sealed instrument. The action takes its name from the Latin verb by which the ancient pleadings described the promise of the defendant. It is the action most frequently in use in the common law courts.

READ: 3 Bl. Com., pp. 157–166;
Andrews, American Law, § 670;
Chitty on Pleading, pp. 110–121;
Stephen on Pleading, § 82;
Perry on Pleading, pp. 82–89;
Shipman on Pleading, §§ 6–9.

§ 256. Of Actions Ex Contractu: Debt.

The *action of debt* is brought to recover a specific sum of money due from the defendant to the plaintiff. The obligation to pay the money may have arisen out of any species of contract; or out of a judgment or an award of money; or out of statutes imposing money penalties or prescribing money rewards; or out of public assessments or taxation. Of this action there are two forms: the *debet* and the *detinet*. The *debet* is employed when the defendant personally owes the debt. The *detinet is* used when the defendant owes the debt in some official or representative capacity, such as executor or the like. As this action contemplates a specific sum as the subject-matter in controversy it will not lie for any portion or instalment of an entire indebtedness, unless such portion can

be regarded as a separate and independent debt, or unless its payment is secured by a money penalty expressly attached to the failure to pay each portion or instalment.

Rem. Debt is a *concurrent* action with general assumpsit on all contracts not under seal from which an obligation to pay a specific sum of money has arisen; and with covenant-broken on all contracts under seal which create a similar obligation. On the *judgment* of a court whose records import absolute verity, and are conclusive on all parties, it is the only ordinary remedy by which the damages and costs awarded by the judgment can be recovered in a further action.

READ: 3 Bl. Com., pp. 154, 155;
Andrews, American Law, § 666;
Chitty on Pleading, pp. 121–129;
Stephen on Pleading, §§ 75, 76;
Perry on Pleading, pp. 48–55;
Shipman on Pleading, §§ 11–13.

§ 257. Of Actions Ex Contractu: Covenant-Broken.

The *action of covenant-broken* is brought to recover damages for the breach of a contract under seal. The *terms of the contract* may be explicitly set forth in the sealed instrument, or may be presumed by law from the nature of the transaction represented by it or the technical language it contains. The *contract may stipulate* merely for the performance or non-performance of a certain act, or it may add to this stipulation an agreement to pay a definite money penalty in case the contract should be broken. The *parties directly bound* by a covenant are those who have signed and sealed the instrument; others, like the grantees in a deed-poll, may be *bound indirectly* through the promise which the law implies from their acceptance of its benefits. An action of covenant-broken, being founded upon the breach of the express contract under seal, can be brought only against those who are directly bound thereby; the remedy against those whose obligation rests on their implied promise is assumpsit or, in proper cases, debt.

Rem. Debt is also a concurrent remedy with covenant-broken when the contract is to pay money, or on the clause providing for a money penalty; but when the purpose of the action is to recover

unliquidated damages for the breach of the agreement, covenant-broken alone will lie.

READ: 3 Bl. Com., pp. 155–157;
Chitty on Pleading, pp. 129–135;
Perry on Pleading, pp. 57–60;
Shipman on Pleading, § 10.

§ 258. Of Actions Ex Contractu: Account.

The *action of account* is brought to compel the defendant to compute with the plaintiff their mutual accounts, and to pay to him any balance that may be found due. This action will lie only when some relation exists between the parties which obliges the defendant to inform the plaintiff of the state of affairs, and deliver to him the property or pay him the amount of money which may legally belong to him. Such relations subsist between a principal and agent; a guardian and ward; a trustee and his *cestui que trust;* one co-partner and another; one co-tenant and another; and between merchants who customarily exchange commodities and credit with each other. In this action *the first question* to be settled is the existence of the alleged relation; and if this is proved, to the satisfaction of the court, it renders against the defendant a judgment *quod computet,* — that he do account. The account is then taken by the parties in the presence of the court or before duly appointed auditors, and the balance, if any, in his favor is awarded to the plaintiff by a second judgment, on which an execution issues to procure its payment.

Rem. Resort to this action is necessary only when the plaintiff does not know, or cannot prove, the amount of the balance due him. In other cases, his remedy is in debt or assumpsit. Courts of common law have no jurisdiction where there are more than two parties to the mutual relation. Recourse must then be had to a court of equity; before which for this and other reasons most actions of account are now brought.

READ: 3 Bl. Com., p. 162;
Chitty on Pleading, pp. 45–48, 371, 515;
Stephen on Pleading, § 77;
Perry on Pleading, p. 60;
Shipman on Pleading, § 14;
Maxwell on Pleading and Practice, §§ 880–883.

§ 259. Of Actions Ex Delicto: Trespass.

The *action of trespass* is brought to recover damages for an injury produced by the unlawful exercise of *direct force*, express or implied. It is of various forms: (1) *Trespass quare clausum*, for a forcible intrusion upon land; (2) *Trespass de bonis*, for the forcible removal or destruction of personal property; (3) *Trespass vi et armis*, for any forcible injury to person or property, when not involving dispossession; (4) *Trespass per quod*, for the abduction, criminal conversation, or physical injury of a wife, for the abduction of a child or servant, and for the battery or seduction of a servant. All persons who instigate or unite in the forcible act *are liable for the trespass*, and may be sued jointly or separately at the option of the plaintiff; though when he has recovered full satisfaction from any one of the wrongdoers his rights against the others are extinguished. The *damages* awarded in this action are generally measured by the actual amount of loss, but in trespass for injuries to personal or family rights, and sometimes for other wanton and aggravated wrongs, the law permits the court to give the plaintiff *punitive damages*.

Rem. An action for trespass to property must be brought by the person in whom the *possession* of the property resided at the time of the trespass. This may be the owner or bailee in the case of a chattel, or the owner, tenant, or other occupant in the case of corporeal real property. Even the *naked possession* of an intruder, if peaceable, is sufficient to maintain this action against one who has no right to the possession. Where no one is in the occupation of land, its true owner has constructive possession by virtue of his title, and can sue in trespass. If no actual possession of a chattel exists, the constructive possession resides in the person who has the right to take immediate possession. The *custody* of an agent or servant is the possession of the master, and the master must therefore institute the suit.

READ: 3 Bl. Com., pp. 120–123, 138, 142, 151, 211;
Andrews, American Law, § 673;
Addison on Torts, §§ 42, 64–74, 83, 98–100, 113, 150–156, 396–400, 532–536, 621, 624, 631–633, 636, 638, 649;
Pollock on Torts, pp. 269–285;
Jaggard on Torts, §§ 124–140, 208–214, 217;
Chitty on Pleading, pp. 140–148, 186–209;
Stephen on Pleading, § 80;
Perry on Pleading, pp. 63–73;
Shipman on Pleading, § 15.

§ 260. Of Actions Ex Delicto: Case.

The *action of case*, or trespass on the case, is brought to recover damages for any violation of a legal right for which the courts of common law can give redress, and for which no other common law remedy has been provided. It *lies* for all torts to person or property without direct force, actual or implied; for all injuries to person or property by indirect force, or where direct force has created conditions in which secondary or intermediate causes operate to produce harmful results; for all disturbances of incorporeal rights; for loss occasioned to reversioners by injuries inflicted upon property while in the possession of particular tenants or bailees, and for which the possessors could maintain an action of trespass; for all wrongs arising from neglect of duty or abuse of authority, and not consisting in mere breach of contract. It is the remedy for nuisance; libel; slander; malicious prosecution; waste; disturbance; the diversion or pollution of watercourses; the breach of duty by carriers and other bailees; the usurpation by co-tenants of excessive powers over joint property; the infringement of patents, copyrights, and trademarks; the malpractice of physicians and attorneys; the retainer of servants; and every form of conspiracy and fraud, except where fraud is the legal equivalent of direct force. In short, it is a *universal remedy* whose possibilities have never yet been exhausted, and whose flexibility has enabled the courts of common law to keep pace with the advancing needs of society, so far as their formal limitations will permit.

Rem. This action is a concurrent remedy with assumpsit where the tort arises out of a breach of contract; and with trespass when a forcible act causing direct injury is the result of carelessness; the assumpsit lying on the breach of contract, and the trespass on the forcible act; while the negligence in both instances is the foundation for the trespass on the case. The action must be brought by the person who sustains the injury, and against the person who causes it. The *damages* are measured by the injury inflicted, and in many cases of gross and wanton wrong may be increased to any amount not palpably unjust.

READ: 3 Bl. Com., pp. 122–127, 153, 165, 166, 220–237;
Andrews, American Law, §§ 669, 677;
Addison on Torts, §§ 205–214, 222–226, 401, 810–817;
Cooley on Torts, pp. 90–96;

Pollock on Torts, pp. 211–224, 292–294, 456, 457, 487–491, 644–668, 682–685;
Chitty on Pleading, pp. 148–164;
Stephen on Pleading, § 81;
Perry on Pleading, pp. 77–82;
Shipman on Pleading, §§ 17–19.

§ 261. Of Actions Ex Delicto: Trover.

The *action of trover* is brought to recover damages for the conversion of personal property. Conversion is an injury both to possession and ownership; and hence no one can sustain this action unless at the date of the alleged conversion he was either a general or special owner of the property, and also had its actual possession or a right to its immediate possession. All persons who by act or procurement engage in the conversion are jointly and severally liable for the injury like other joint tort-feasors. Unless the plaintiff is prepared to prove an original wrongful taking, or a subsequent act of conversion, he should *make demand* upon the defendant for the surrender of the property before the action is commenced; and if this demand is unconditional, and is unconditionally refused, the evidence of conversion is complete. If the refusal is equivocal the plaintiff may be compelled to seek his remedy in an action of replevin, or detinue, or trespass on the case. The *damages in trover* are usually measured by the value of the property at the date of the conversion with interest to the date of judgment; but this amount may be diminished if the property has been returned to the plaintiff and accepted by him, or increased if the conversion has caused him any special loss. If the defendant still retains the property he becomes its owner when he satisfies the judgment. Trover is an alternate remedy with trespass for a tortious taking, and a concurrent remedy with case and assumpsit for a conversion by bailees and other persons whose special ownership and possession is derived by contract from the general owner.

Rem. An action of trover may be brought by a general owner where there is no rightful possession in another person; or by a bailee into whose possession the property has been delivered by the general owner; or by a finder who holds the property in trust for the owner; but not by a servant or a trespasser or any other tortious holder. But a disseisee who has regained his seisin

may recover in this action the value of the timber taken from the land during his dispossession, on the ground that from the restoration of his seisin the law presumes that he has never been disseised. A co-tenant can maintain this action against another co-tenant for the sale or destruction of the common property, or against a stranger for the conversion of his aliquot share. When a general owner has a remedy against a bailee or other rightful possessor, for injury to his right of ownership, it is in case and not in trover.

READ: 3 Bl. Com., p. 152;
Andrews, American Law, § 671;
Addison on Torts, §§ 532, 543–545, 547–553;
Jaggard on Torts, § 231;
Chitty on Pleading, pp. 164–181;
Stephen on Pleading, § 83;
Perry on Pleading, pp. 90–93;
Shipman on Pleading, § 16.

§ 262. Of Actions Ex Delicto: Replevin.

The *action of replevin* is brought to recover the possession of personal property, with or without damages for its unlawful detention. The plaintiff in replevin must have a general or special ownership in the property, and must have a right to its immediate possession as against the defendant at the date of the commencement of the suit; and the defendant, at the same date, must be the person by whom the property is unlawfully detained. Hence one co-tenant cannot sue another in this action; nor a reversioner maintain it against a particular tenant or bailee; nor any owner against an officer holding it under legal process; nor a defendant in replevin against the plaintiff who has previously replevied it. To fix the date of the unlawful detention, as well as to demonstrate the fact of such detention, a *demand* for the return of the property is frequently advisable before the suit in replevin is commenced. The *damages* in this action are measured, where the property is replevied, by the loss caused by its detention; where the property is not replevied, by the value of the property at the date when the detention began with interest to the date of judgment, and such other compensation as the circumstances attending the detention may require.

Rem. This action was originally intended for the relief of persons whose goods had been taken by distress, where the dis-

trainor refused to accept security and return the goods. The distrainee could then obtain a writ, in pursuance of which the sheriff restored to him the goods if he could find them, and took from him a bond or other assurance that he would prosecute the suit to judgment, and if defeated would return the goods to the distrainor. Upon the trial the distrainor either denied the taking, or asserted title in himself, or made avowry or cognizance admitting the taking and attempting to justify it. If the distrainee prevailed he retained the goods and recovered damages for the unlawful taking and detention. If the distrainor prevailed the distrainee was ordered to return the goods to him and pay him damages for replevying them; and unless he did so the bond or other assurance was enforced in his favor. The completeness and convenience of this remedy, for the immediate recovery of personal property *in specie*, has led to its extension, in many States, to all cases where such property is unlawfully withheld, and to the regulation of its details by local statutes.

READ: 3 Bl. Com., pp. 145–151;
Andrews, American Law, § 672;
Addison on Torts, §§ 539–541;
Chitty on Pleading, pp. 181–186;
Stephen on Pleading, § 84;
Perry on Pleading, pp. 73–77;
Shipman on Pleading, § 21.

§ 263. Of Actions Ex Delicto: Detinue.

The *action of detinue* is brought to recover the possession of personal property, with damages for its detention, in cases where replevin does not lie. The plaintiff must have a general or special ownership in the property, and a right to its immediate possession at the time when the demand for its return is made. The *judgment* for the plaintiff orders the restoration of the property to him, and if this is impossible requires the payment to him of its value with other items of loss occasioned by its detention; and an execution issues in serving which the sheriff may employ any necessary force in seizing the property and delivering it to the plaintiff.

Rem. This is a very ancient action, and resembles debt, out of which it grew, in the necessity for a demand upon the defendant for the return of the property before the suit is commenced, unless he was the original wrongful taker. It also *differs from replevin* in that the property is recovered, if at all, at the end and not at

the beginning of the suit. Where the action of replevin has been extended beyond its former sphere, the action of detinue is correspondingly restricted, and in some of our States seems to be comparatively unknown. In others, it serves chiefly as a remedy for the recovery of goods entrusted to a bailee or conditional vendee who refuses to return them according to his contract.

READ: 3 Bl. Com., p. 151;
Addison on Torts, §§ 76, 77;
Chitty on Pleading, pp. 136–140;
Perry on Pleading, pp. 55–57;
Shipman on Pleading, § 20.

§ 264. Of Extraordinary Actions: Prerogative Writs.

Besides the ordinary common law actions just described our courts of common law now take cognizance of several classes of actions known respectively as (1) Extraordinary Actions; (2) Auxiliary Actions; and (3) Statutory Actions. *Extraordinary actions* are intended to provide a remedy for wrongs inflicted by the actions or omissions of governmental agencies, or of persons upon whom some public duty is imposed, in cases where the ordinary common law actions would give no adequate relief. *Auxiliary actions* are proceedings intended to correct or carry into effect some previous or concurrent judicial action, and thus practically complete the legal remedy. *Statutory actions* are proceedings instituted under special statutes, and by them placed under the jurisdiction of the courts of common law. The extraordinary actions are now *five* in number: (1) Mandamus; (2) Procedendo; (3) Prohibition; (4) Quo Warranto; (5) Habeas Corpus. These are in every case *emergency actions*, designed to give immediate as well as adequate relief, and to this end their methods of procedure are adapted.

Rem. The extraordinary actions are also called *prerogative writs*, because they were once direct interferences by the sovereign, in the interest of justice, by virtue of his royal prerogative; but were long ago entrusted to the common law courts, as proceedings within their regular jurisdiction.

READ: Andrews, American Law, § 710;
Clark, Elementary Law, § 246;
Perry on Pleading, p. 102.

§ 265. Of Extraordinary Actions: Mandamus.

A *writ of mandamus* is a mandate issuing out of a court of superior jurisdiction, and directed to some inferior court, or public officer or corporation, or other person over whom the superior court has legal authority, requiring such inferior court, officer, corporation, or person to perform some particular act specified in the mandate. The *act required* to be done must be one which the respondent is able to perform; must be ministerial and not judicial in its character; must be obligatory, not discretionary; transitory, not permanent; definite, not ambiguous; and clearly and precisely set forth in the mandate. The *right of the petitioner* to have the act performed must be self-evident or fully demonstrated, and it must be apparent that no ordinary remedy will protect his right. In commencing this action the petitioner, called also the *relator*, applies in writing to the court in the name of the State, describing the circumstances which entitle him to the writ, and praying that a mandate issue directing the respondent to perform the desired act, or show cause why he refuses so to do. If the court deems the facts alleged to be sufficient the mandate issues, and is known as the *alternative writ*. In his answer the respondent must either assert that he has performed the act, or give his reasons for its non-performance. If he makes no answer, or the court finds his reasons for his failure to perform it to be inadequate, another mandate issues, called the *peremptory writ;* his disobedience to which will be a contempt of court subjecting him to fine and imprisonment. In cases where the duty is clear, and no excuse for its non-performance is possible, the peremptory writ may be awarded at the outset.

Rem. A *mandamus cannot issue* against coequal and coordinate branches of the government; nor can it create new rights nor correct nor compensate an injury already past, but can only prevent a future wrong against existing rights. While it is not a writ of right, the courts never withhold it where justice requires its use; and by its means all public functionaries, corporation officers, and other individuals who are within the jurisdiction of the court can be compelled to discharge the public duties imposed upon them by the law. In most instances, before instituting this proceeding, the relator is required to make a *formal demand* upon the respondent for the performance

of the duty, unless it is apparent that his past neglect has been intentional. In many States the details of this action are regulated by statutes.

READ: 3 Bl. Com., pp. 110, 111, 264, 265;
High, Ex. Rem., chaps. i–xii;
Perry on Pleading, pp. 102, 103;
Wood on Mandamus, etc., pp. 1–99;
Spelling on Injunctions, etc., §§ 1362–1622.

§ 266. Of Extraordinary Actions: Procedendo.

A *writ of procedendo* is a mandate issuing out of a court of superior jurisdiction, and directed to an inferior court commanding it to proceed with the hearing and decision of a cause now pending before it, but whose progress is being unjustly delayed. In many respects it resembles a mandamus, by which in modern practice it is now generally superseded.

Rem. The principal form of *procedendo* now in use is that attached to a judgment of a higher court on an appeal or writ of error from a lower court, directing the lower court to resume its proceedings in conformity with the judgment. This *procedendo* issues as a matter of course upon the decision of the higher court. The ancient form was granted on a motion or petition setting up the necessary facts, and giving the inferior court an opportunity to show cause why the case should not proceed; failing which, the order to proceed was made peremptory and its disobedience punished as a contempt.

READ: 3 Bl. Com., p. 109;
Perry on Pleading, p. 103.

§ 267. Of Extraordinary Actions: Prohibition.

A *writ of prohibition* is a mandate issuing out of a court of superior jurisdiction, and directed to a court or judicial officer of inferior jurisdiction before whom a suit is pending, commanding him to desist from further action in the suit because of his want of jurisdiction, or in conducting it to keep within his jurisdiction. Upon a proper occasion this writ is allowed as a *matter of right.* To obtain it the petitioner files a *suggestion* in the superior court, reciting all the necessary facts; and if the facts are of record in the court below he also presents a certified copy of the record. On this suggestion a rule is granted against the respondent to show cause why the writ of pro-

hibition should not be allowed. This rule stays the proceedings in the inferior court, and then after such hearing as the local law requires the writ is finally granted or refused. Disobedience to the writ is a contempt of court for which all parties concerned in it may be punished.

Rem. A court may exceed its jurisdiction either by taking cognizance of a case over which it has no authority whatever, or by proceeding in a case within its jurisdiction in an unlawful manner. To prevent these evils the writ of prohibition was intended, as also to stay the operations of judicial officers who usurp an authority which they do not possess. But it cannot be employed to control the discretion or judgment of a court upon matters within its proper sphere of action; nor to prevent it from deciding a cause unjustly or from enforcing its own decisions. Nor will it lie against the legislature or the governor of a State; nor to test the validity of past official acts; nor to try the title of an officer *de facto* to his office; nor in any case where an adequate ordinary remedy exists.

READ: 3 Bl. Com., pp. 112–114;
High, Ex. Rem., ch. xxi;
Perry on Pleading, pp. 103, 104;
Wood on Mandamus, etc., pp. 99–110;
Spelling on Injunctions, etc., §§ 1716–1744.

§ 268. Of Extraordinary Actions: Quo Warranto.

The *writ of quo warranto* is a mandate issued by a court of competent jurisdiction, directing the holder of a franchise or a public office to appear before it and show by what authority he holds them, in order that his right thereto may be determined. When employed to *try the title to an office* the relator must himself be a claimant of the same office, so that the adverse rights of all the claimants can be investigated; and must prevail, if at all, by the strength of his own title and not by the weakness of that of the respondent. Upon him, therefore, rests the burden of proving the usurpation of the respondent as well as his own right. A judgment in his favor places him in lawful possession of the office with a right to its emoluments, and if the usurper persists in his intrusion he may be punished for contempt. Where the law requires the relator to be installed into the office by some superior authority, who refuses to perform the proper ceremonies, he may be compelled to do

so by mandamus. The *usurpation of a franchise* may consist either in its exercise without original authority, or in its exercise after it has been forfeited by non-user or abuse. A *quo warranto* may issue for such a usurpation at the instance of the State, and in this proceeding the respondent must justify his action, or a judgment of ouster will be rendered against him. This is the remedy alike against individuals who falsely claim to be a corporation, and against a true corporation which has forfeited its charter, — the judgment in the latter case depriving the corporation of its franchises and revesting them in the State.

Rem. A *quo warranto* was originally a proceeding by the sovereign to put an end to usurpations of his royal rights, but has been extended to enable any person, having an interest in a franchise or a public office other than as a mere member of the public, to raise the question of title against any alleged intruder. It will not lie to try the title to a private office; nor after the term of the contested office has expired; nor against an officer *functus officio* unless to ascertain the validity of his past official acts. It is not a writ of right, but will be granted or withheld at the discretion of the court according to the importance of the matter, and the clearness of the relator's right; and will not be allowed where ordinary remedies are equally available. In his application for it the relator must fully set forth the grounds of his complaint, and pray for the desired relief. The writ, if issued, will after a due hearing be dismissed, or be followed by a judgment for the relator or respondent, enforced when necessary by proceedings for contempt.

READ: 3 Bl. Com., pp. 262–264;
High, Ex. Rem., chaps. xiii–xx;
Perry on Pleading, pp. 104–105;
Wood on Mandamus, etc., pp. 188–206;
Spelling on Injunctions, etc., §§ 1765–1833.

§ 269. Of Extraordinary Actions: Habeas Corpus.

A *writ of habeas corpus* is a mandate issued by a court of competent jurisdiction to some person, by whom another person is alleged to be detained, directing him to produce the body of his prisoner before the court at a certain time and place, together with the cause of his detention, and there abide the order of the court thereon. This writ may be issued by the court in session, or in vacation by any of its judges, and may be

made immediately returnable. It may be granted either on the application of the alleged prisoner himself, or on that of any person who is willing to procure it. The respondent, if the alleged prisoner is in his possession, must bring him into court at the appointed time and place, and set forth in his return the facts on which he justifies or excuses the detention; and after a due hearing the court determines the further disposition of the prisoner. If it finds the detention to be unlawful it orders the prisoner to be released; if the confinement is on *mesne process* and is lawful he will be enlarged on bail; if the confinement is on lawful *final process* he will be remanded into custody and the writ dismissed; if the detention is by virtue of a family right he will be delivered to the person in whom that right resides.

Rem. This remedy has existed in some form from early ages but has been extended and regulated by several statutes, principally by the Act of 31 Charles II, (A. D. 1680). It is paramount to all other actions and is a supreme and universal remedy for all wrongful restraints on the freedom of locomotion; and though it may be suspended in great national emergencies it can neither be curtailed nor abrogated by the legislature, nor withheld by the courts when a proper claim for its issue is presented. It *may be employed* to bring a prisoner held in lawful confinement into court in order that he may plead, or testify, or satisfy a judgment, or perform any act or enjoy any privilege which requires his personal presence; or to regain control over a wife, child, ward, or other person who is unlawfully kept from his superior or guardian; or to obtain the release of any person unlawfully confined. But it *cannot be used* to bring the final proceedings of a court of competent jurisdiction up for review on error or appeal, or to reverse its judgment or thwart its execution. The failure of one application for the writ is no bar to another should the circumstances change.

READ: 3 Bl. Com., pp. 129–138;
Perry on Pleading, pp. 105–107;
Wood on Mandamus, etc., pp. 111–147;
Spelling on Injunctions, etc., §§ 1151–1161, 1190–1312.

§ 270. Of Auxiliary Actions.

An *auxiliary action* is distinguished from the principal action by the fact that it must be commenced by new original process, and for the purpose of bringing in new parties, or of subjecting

the same parties to additional or different liabilities, or of instituting a new series of proceedings after the former have been terminated by a final judgment. The chief auxiliary actions now in use are (1) Garnishment; (2) Scire Facias; (3) Writ of Error. Cases which are beyond the reach of these actions require the interference of a court of equity.

Rem. The ordinary method of carrying a judgment into effect by levying an execution may often fail because the property of the defeated party is beyond the reach of the execution creditor, or because the time to which the power to levy is limited has expired, or for other reasons arising out of the peculiar circumstances of the case. When this occurs other means may be found of attaining the same object which it is the purpose of the first two of these auxiliary actions to provide. The third is a method of preventing the enforcement of an erroneous judgment.

READ: 3 Bl. Com., pp. 406, 416, 417, 421;
Maxwell on Pleading and Practice, §§ 485–494.

§ 271. Of Auxiliary Actions: Garnishment.

Garnishment is an auxiliary action, brought by the plaintiff in the principal action against some debtor, agent, or trustee of the defendant, requiring him to disclose the character and amount of his obligations to the defendant, and to pay over to the plaintiff such a sum as the court may order, to be applied in entire or partial satisfaction of the judgment which the plaintiff has obtained or may obtain against the defendant. In this action the *garnishee* is presumed to be indifferent to the issue in the principal action, and therefore cannot dispute the plaintiff's claim against the defendant. The process obliges him to appear and reveal his own relations to the defendant, and then await the order of the court; and if in the meantime he changes these relations he does it at his peril. It is his duty to notify the defendant of the garnishment that he may protect his own rights, but having done this the garnishee may safely follow the directions of the court in reference to his further conduct; and any payment he may make under its orders will to that extent release him from his obligations to the defendant.

Rem. This auxiliary action partakes of the nature of an action *in rem* against the property in the hands of the garnishee, and of

a bill in equity for a discovery. It is largely regulated by local statutes, and is known by various names, such as "*foreign attachment*," the "*trustee process*," "*copying process*," "*factorizing process*," etc. As the object of this action is to render available to the plaintiff the claims which the defendant could assert against the garnishee, the proceedings in it cannot subject the garnishee or the property in his hands to any other liability than he is already under to the defendant. Thus a garnishment may reach debts owing by the garnishee to the defendant though not yet payable, and goods in his possession as bailee, agent, or trustee which the defendant could immediately reclaim; but cannot interfere with contingent debts, nor with property acquired by trespass, nor with liabilities for tort not yet measured by a judgment for damages, nor with property in the custody of the law or held in trust for outside parties or in reference to which the garnishee has legal duties to perform requiring its possession. On grounds of public policy the law also forbids the garnishment of *debts due by the State* or public corporations to the defendant, or of official salaries.

READ: Drake on Attachment, §§ 1–12, 38, 39, 48–68, 71 *b*, 77 *v*, 450–467, 660–698;
Waples on Attachment and Garnishment, chaps. i, ii, vi;
Shinn on Attachment and Garnishment, §§ 1–75, 465–514;
Wade on Attachment, §§ 325–355;
Maxwell on Pleading and Practice, §§ 451–473.

§ 272. Of Auxiliary Actions: Scire Facias.

Scire facias is an action based upon a judgment, recognizance, or other judicial record directing the respondent to show cause, if any he has, why the record should not be enforced, amended, vacated, or set aside. This action must be instituted in the court where the record on which it is based has been preserved. The writ issues upon a suggestion to the court by the party interested, and the hearing on the writ and return is confined to matters of law arising on the record, and matters of fact occurring since the record was made. The trial of the question of fact may be by jury, upon whose verdict and its own conclusions of law the court will make such order as the justice of the case requires.

Rem. The most frequent uses of the writ of *scire facias* are the following: (1) To revive a judgment after the death of one of the parties, or after the customary time within which an execution can be granted has expired; (2) To introduce new parties

to the record; (3) To obtain an execution against the sureties on a forfeited recognizance; (4) To enforce a lien arising from a mortgage or a statute; (5) To repeal or vacate a patent or other franchise when the grant is matter of record in the court; (6) To compel an officer to pay over money collected by him on an execution; (7) To compel the mulcted party to pay a fine; (8) To compel a party to appear and show the cause of his disobedience to an order of the court. Another proceeding to revive a judgment is a bill in equity called a "*Bill of Revivor.*"

READ: 3 Bl. Com., pp. 248, 261, 413, 416, 421;
2 Kent Com., Lect. xxxiii, p. 313;
Andrews, American Law, § 857;
Perry on Pleading, pp. 60–63;
Maxwell on Pleading and Practice, § 934.

§ 273. Of Auxiliary Actions: Writ of Error.

A *writ of error* is an action brought to obtain the reversal of the final judgment in a previous action, on account of some mistake of law or fact apparent on the record. This action may be instituted by a party or privy to the former action, or by any person to whose interests the judgment is directly prejudicial; and all persons who might be affected by the reversal of the judgment must be made defendants and have an opportunity to present their claims. Every error complained of, or the facts out of which it grows, must appear upon the record of the case. This *record necessarily contains* a recital of the process, pleadings, verdict, and judgment. To this may be added by the parties, with the consent of the court, a further statement called the "*bill of exceptions,*" in which are set forth all interlocutory proceedings, motions, occurrences at the trial, rulings on the admission or rejection of evidence, the instructions of the judge to the jury, and any other matters on which the plaintiff in error bases his claim for the reversal. Upon the record, thus perfected and presented to the court, such testimony and arguments may be heard as may be necessary, and the previous judgment will then be reversed, modified, or affirmed as justice may require. When a writ of error is brought before an execution has been issued on the judgment, the *execution may be stayed* either absolutely, or upon condition that the plaintiff in error secure the defendant against loss by the delay. If execution has already issued, and been levied, the existing

circumstances are not interfered with until the judgment is reversed, and then the execution creditor may be compelled to make restitution.

Rem. A writ of error may be brought either to the same court in which the previous judgment was rendered, or to an appellate court. Where the reversal is claimed on account of errors of fact the writ must be brought to the same court, and is called a "*writ coram nobis.*" The errors which may then be taken advantage of are such as affect the jurisdiction of the court to render the judgment; for instance, the incapacity of the parties to sue or be sued, the want of opportunity of one of the parties to appear and be heard, or the failure of the court to appoint a *guardian ad litem* for an infant defendant. A writ of error based on mistakes of law of a substantial character is brought to an appellate court, and is called a *writ coram vobis;* and on this action all errors apparent on the record are open to review, and if the judgment is reversed the proceedings are remanded to the lower court for a new trial from the point at which the earliest mistake occurred. A writ of error will not lie for mistakes in matters of discretion, or those of a mere formal nature, or those which work no material injury to the defeated party. The time within which a writ of error must be brought after the previous judgment is rendered is sometimes regulated by statute; and in certain States motions in the nature of a writ of error are permitted to be made as part of the original proceedings. Another method of reviewing the proceedings of an inferior court is by *certiorari,* which is a writ issued by a superior to an inferior tribunal requiring it to certify up to the superior court the record in the case, in order that the correctness of the rulings of the inferior court may be examined.

READ: 3 Bl. Com., pp. 406–411;
Andrews, American Law, § 802;
Perry on Pleading, pp. 222–225;
Shipman on Pleading, §§ 91, 92;
Maxwell on Pleading and Practice, §§ 474–479.

§ 274. Of Statutory Actions.

A *statutory action* is an action brought under the provisions of a local statute which affords to an injured party some peculiar form or method of redress. The statutes on which such actions may be based may be remedial or penal statutes; but in either case the action is a *private action,* and is conducted by the plaintiff at his own expense. Statutes providing special remedies are

of strict construction, and actions brought thereon must comply with all the directions of the statutes.

Rem. A *remedial statute* may provide a new remedy for wrongs against existing rights; or may create a new right and prescribe a remedy for its violation; or may create the right and leave the person injured by its infringement to such redress as the courts of law and equity afford. In any of these cases the aggrieved party may avail himself of any of these actions at his option, unless the statute makes its remedy exclusive. A *penal statute* may authorize an injured person to sue public offenders, in an action on the statute, for the damages inflicted by their crimes, and may fix the amount of damages far beyond what could be recovered in ordinary actions. Penal statutes may also empower private persons to bring actions in the name of the State as well as their own names against a criminal to recover the fine attached by law to the offence; one moiety of the fine to be paid to the State, the other moiety to be kept by the plaintiff as a compensation for his trouble. Such actions are called *qui tam actions*, and are instituted at the risk and expense of the plaintiff.

READ: 3 Bl. Com., pp. 159, 160;
4 Bl. Com., p. 308;
Chitty on Pleading, pp. 119, 125, 126, 161;
Perry on Pleading, p. 51;
Shipman on Pleading, §§ 9, 11, 19;
Foster's First Book of Practice, pp. 194–196.

§ 275. Of the Election of Actions.

Different actions are sometimes available for the same wrongs, — as assumpsit and debt, debt and covenant, trover and replevin. Where the wrong in all its aspects violates but a single right the available actions are consistent with one another and are said to be *concurrent;* and may all be pursued at once as different portions of the same remedial proceeding, though but one adequate compensation for the wrong can be obtained. But where the aspects of the wrong are distinguished by its relation to separate legal rights, the assertion of one of which involves the waiver of the other, the available actions are inconsistent with each other, and are said to be *alternate,* or mutually exclusive of each other; as in trover for the conversion of chattels and assumpsit for their value, or as in trespass for intrusion upon land and assumpsit for its use and occupation.

Between alternate remedies a choice must always be made, and if the one selected is within the jurisdiction of the court, and is legally adapted to the facts in controversy, the choice becomes irrevocable when the suit is instituted, and all its alternates are forever waived. An election between concurrent remedies is not necessarily final, but if one should be tried and fails others may be brought until the ends of justice are accomplished.

Rem. Some of the principal reasons by which a *choice* between alternate or concurrent remedies *is guided* are the following: (1) The status of the parties, determining their capacity or liability in certain forms of action and not in others; (2) The Statute of Limitations, under which some actions are barred earlier than others; (3) The insolvency of the defendant which may make some remedies useless, while others might be productive of results; (4) The right to arrest the body of the defendant which is incidental to some actions and not to others; (5) The rules regulating damages, under which a larger compensation might be obtained in certain actions than in others; (6) The joinder of defendants, which is necessary in contract actions, but optional in torts; (7) The joinder of causes of action, the rules governing which are more liberal in some forms of action than in others; (8) The nature of the evidence obtainable, which may be sufficient to support one action and not another; (9) The difference between actions as to matters of procedure, which may make one action more convenient or advantageous to the plaintiff than the others.

READ: Chitty on Pleading, pp. 151, 229–234;
Stephen on Pleading, §§ 44–51;
Perry on Pleading, pp. 111–115;
Shipman on Pleading, § 9;
Bliss on Code Pleading, §§ 11–19.

§ 276. Of the Joinder of Actions.

The law encourages the *joinder in one action of distinct causes of action*, so far as this may be consistent with coherence and economy in the proceedings; and should a plaintiff without necessity refuse to make such joinder, and institute separate suits, the courts have power to compel him to *consolidate his actions*, and seek in one proceeding for the vindication of his violated rights. Not only may different causes be joined in one suit, but *different forms of actions ex contractu*, or different

forms of actions *ex delicto*, may be joined in the same action by stating them in *different counts* in the plaintiff's declaration; and in States which have adopted the New Procedure actions *ex contractu* may be joined with actions *ex delicto* unless the combination produces such confusion as to prevent an intelligent determination of the issues. Different modes of *stating the same cause of action* in different counts in the same declaration are also permitted, in order to meet unexpected phases of the testimony, so that upon the proof hereafter to be given some one of them may be sufficiently established.

Rem. The law does not permit a *single* cause of action to be *divided* into several parts, — as a debt into its different items, or a tort into wrongs against the different articles of property which may be injured by it, — and each part to be made the subject of a different suit. In case of a continuing injury, or of an obligation whose fulfilment requires the performance of several acts, the plaintiff must wait until the injury is complete or the obligation has matured before he institutes his suit, and then must include all his claims for compensation in his single action. If he sues prematurely he can prove only the injuries he has sustained before he institutes his action, and if on such a suit he recovers damages he waives all right of action for the losses he may subsequently undergo.

READ: Chitty on Pleading, pp. 221–229;
Perry on Pleading, pp. 109–111;
Shipman on Pleading, § 255;
Gould on Pleading, ch. iv, §§ 79–98;
Bliss on Code Pleading, §§ 111–134;
Maxwell on Code Pleading, pp. 340–357.

SECTION II

OF THE DEFENCES TO ACTIONS IN THE COURTS OF COMMON LAW

§ 277. Of the Universal Defences.

Defences to actions are those matters of law or fact which a defendant is at liberty to urge in order to defeat the plaintiff's claim. Some defences reach the *merits* of the controversy, and deny the existence of the cause of action. Others attack the *action only*, and affirm either that the plaintiff had no right to bring it, or that he has instituted it in an improper manner. Still others deny the *jurisdiction* of the court to entertain the

action. All those defences which deny the jurisdiction of the court or attack the action only, and some of those which reach the merits of the controversy, are available in every form of action and are therefore universal defences; others are peculiar to one action or to a few kindred actions. Of the *universal defences* there are *ten*: (1) Want of jurisdiction; (2) Action improperly instituted; (3) Statute of Limitations; (4) Joint wrong; (5) Equal fault; (6) Estoppel; (7) Accord and satisfaction; (8) Arbitration and award; (9) Former recovery; (10) Release. The special defences vary in number and character with the different actions to which they relate.

Rem. Any one of the universal defences, if sustained, is fatal to the action. The law, however, compels the defendant to observe a *certain order* in their presentation. Thus a defence based on the want of jurisdiction must be offered, if at all, before any other is asserted, since the proof of this precludes the necessity of urging any other. For a similar reason the defence of action improperly instituted is the second in order. The other eight may be presented simultaneously, or singly, or in connection with the special defences peculiar to the action.

READ: Chitty on Pleading, pp. 456, 457.

§ 278. Of the Universal Defences: Want of Jurisdiction.

No court can for a moment entertain an action unless it has jurisdiction both over the parties and the subject-matter, and therefore any defence based on the *want of jurisdiction*, if successful, requires the immediate dismissal of the action from the court. The want of jurisdiction may depend upon matters of fact or upon matters of law, and whenever these matters are brought to the attention of the court it is its duty at once to cease proceedings, and erase the suit from its records.

Rem. It is not even necessary for the defendant to urge this defence; for if it comes in any way to the knowledge of the court, as by inspection of the record or the disclosures of the evidence, and at any stage of the proceedings, its duty is the same, since neither its own authority nor the consent or conduct of the parties can confer a jurisdiction which the law has not bestowed.

READ: Chitty on Pleading, pp. 279–291, 457–459;
Maxwell on Pleading and Practice, §§ 3–15.

§ 279. Of the Universal Defences: Action Improperly Instituted.

An *action is properly instituted* when a correctly described plaintiff, having capacity to sue, brings into court by proper legal process a correctly described defendant capable of being sued, upon an accrued and outstanding cause of action recognized by law. A plaintiff and defendant are *correctly described* when the precise persons who constitute these parties are named as such by their true Christian names and surnames, their places of residence, and any official titles that may be necessary to show their relation to the cause of action for which the suit is brought. The plaintiff has *capacity to sue*, and the defendant to be sued, when they are of normal status or when, though of abnormal status, they are not deprived of that capacity by their peculiar abnormality. The defendant is *brought into court* by proper legal process when a sufficient writ has been lawfully issued against him, and has been served upon him by the persons and in the manner prescribed by law. A *cause of action recognized by law* is one for which the courts of common law afford a remedy. A *cause of action has accrued* when it has reached such a stage of maturity that the law permits the court to instantly apply the remedy. A *cause of action is outstanding* when the plaintiff has not already taken measures, before the same or another court, to obtain the same redress. An action wanting in either of these requisites is not properly before the court, and cannot be proceeded with against the objection of the defendant.

Rem. The defences arising out of the failure of the plaintiff to observe these different requirements in the institution of his suit are the following: (1) *Nonjoinder of persons* who should be plaintiffs; (2) *Misjoinder of persons* who should not be plaintiffs; (3) *Misdescription* of persons who are named as plaintiffs; (4) *Incapacity to sue* of the persons named as plaintiffs; (5) *Nonjoinder* of persons who should be defendants; (6) *Misjoinder of persons* who should not be defendants; (7) *Misdescription of persons* who are named as defendants; (8) *Incapacity to be sued* of the persons who are named as defendants; (9) The *writ defective* in form or substance; (10) *Unlawful issue* of the writ; (11) *Defective service* of the writ; (12) The *cause of action insufficient* in the law to warrant the institution

of the suit; (13) The institution of the suit before the defendant's *wrong had become so complete* as to entitle the plaintiff to an immediate remedy; (14) The *pendency of a prior action* for the same cause of action and seeking the same redress. Either of these defences would, in former times, have been a bar to the further prosecution of the action; but the power is now given by statutes to the plaintiff to *amend* in cases of false joinder, misdescription, and other formal errors, provided the necessary parties have legal capacity, and are properly before the court, and the cause is ripe for action, and no prior inconsistent suit has been commenced.

READ: 3 Bl. Com., pp. 301, 302;
Andrews, American Law, §§ 645, 651;
Chitty on Pleading, pp. 462–470;
Perry on Pleading, pp. 176–178;
Shipman on Pleading, § 51;
2 Greenleaf, Evidence, §§ 18–27.

§ 280. Of the Universal Defences: The Statute of Limitations.

A cause of action may appear to exist, and yet the law may withhold the remedy from the plaintiff on account of some action or omission of which he has been guilty, and which renders it inexpedient or unjust that the action should be maintained. The universal defences thus affecting the plaintiff's right to institute an action are three: (1) The Statute of Limitations; (2) Joint wrong; and (3) Equal fault. The *Statute of Limitations* is intended to prevent the prosecution of stale claims. It fixes definite periods of time within which actions must be commenced after the cause of action becomes complete, provided the plaintiff is capable of suing, and the defendant is within the reach of process and is capable of being sued. These periods are not of equal duration for all actions, nor for the same action in all our States. The *period begins* to run as soon as the plaintiff could, if he would, commence his suit, and thenceforward continues running uninterruptedly unless the defendant by his own act, or by an intervening war or other inevitable obstacle is placed beyond the reach of process.

Rem. This Statute was enacted in the 21 James I. (A. D. 1624), and has been revised and extended by the legislation of our American States. It is optional with the defendant to

avail himself of this defence. He may formally *waive* it, or by a new promise based upon the obligation of the old he may give to the plaintiff a new right of action; or may, when sued, ignore his rights under this Statute and stand upon some other matter of defence. If he insists on this, however, and sustains his claim as to the facts, it forms a complete bar to the plaintiff's suit.

READ: 3 Bl. Com., pp. 306–308;
1 Addison on Torts, pp. 66–70, 262–269;
Jaggard on Torts, §§ 112, 113;
2 Greenleaf, Evidence, §§ 430–448;
3 Parsons on Contracts, pp. 66–101;
Smith, Personal Property, §§ 115–120;
Bolles, Important English Statutes, p. 83, *Stat. Lim., 21 James I.*

§ 281. Of the Universal Defences: Joint Wrong: Equal Fault.

The law forbids a person to *take advantage of his own wrong*, and therefore one who seeks redress through its assistance must himself be free from participation in the wrong by which the injury was inflicted. Thus where two persons voluntarily engage in the same illegal act, and in the execution of their *joint wrong* one sustains an injury through the conduct or omissions of the other, no remedy for such injury can be obtained at law. This rule does not apply where the injurious action or omission formed no part of the *common enterprise*, or where it was in itself a crime directed by one of the parties against the other though with his consent; for in such cases no principle of law prevents the injured party from pursuing his appropriate remedy. The law also refuses to hold a defendant responsible to a plaintiff for injuries to whose causation the plaintiff has contributed by his own *equal fault*. This defence finds frequent application in suits for injuries caused by the defendant's neglect of duty, under the claim that the plaintiff was guilty of "*contributory negligence*."

Rem. These two defences resemble one another in that in each case the injury has resulted from circumstances as to which both parties were at fault. They differ in that in the defence of joint wrong both parties were engaged in the same wrongful undertaking, as to whose evil consequences to themselves the law affords them no protection; while in the defence of equal fault there is no joint wrongful enterprise, but a mere concurrence of independent wrongful actions or omissions out of which,

by reason of their coincidence in place and time, the injury to the plaintiff flows. Thus a riot, in the course of which one of the rioters is injured by the riotous act of his co-rioters, is an instance of joint wrong; a collision between two riders, driving at unreasonable speed at night in opposite directions, is a case of equal fault. Both of these defences are included in the ancient maxim, — "*In pari delicto potior est conditio defendentis.*"

READ: Andrews, American Law, § 658;
Clark, Elementary Law, § 104;
Cooley on Torts, pp. 151–159, 672–683;
Pollock on Torts, pp. 185–191, 205–208;
Jaggard on Torts, §§ 63–65, 270–278.

§ 282. Of the Universal Defences: Estoppel.

The right to institute an action, like every other right except those to personal security and liberty and a few of the most essential family rights, may be suspended or forever barred by an *estoppel.* If the plaintiff has wilfully or negligently misled the defendant into a situation where the suit must take him at an unfair disadvantage, under which he would not have labored had he never been misled, the law will not co-operate with the plaintiff to complete the injury by securing to him, through an action, the advantage which he has thus wrongfully obtained.

Rem. Estoppel is a defence more widely applicable than any other. It may prevent the cause of action from accruing; it may avoid the cause of action when accrued. It may destroy the right of action though the cause be valid; it may forbid one form of action though permitting others; it may cause the dismissal of one suit though offering no hindrance to the immediate institution of its duplicate; it may be an element in the questions which are raised concerning the jurisdiction of the court; and in all stages of the proceedings may serve either party as an effectual answer to the claims of his antagonist. An estoppel which *extinguishes* a cause of action necessarily rests on broader foundations of fact than one which merely suspends or abrogates the right of action, though when it is a bar to the cause of action it at the same time terminates the right.

READ: 3 Bl. Com., p. 308;
Addison on Torts, pp. 745, 746;
Jaggard on Torts, §§ 102–105;
2 Parsons, Contracts, pp. 787–801.

§ 283. Of the Universal Defences: Accord and Satisfaction: Arbitration and Award: Former Recovery: Release.

An *accord and satisfaction*, where satisfaction has been made; an *arbitration and award*, where the award has been accepted and performed; a *former judgment*, where it has been paid; and a *release* given and received between the parties, — these are defences which can extinguish any previously existing cause of action, and put an end to all proceedings under it. A *release* is a writing under seal duly executed by the plaintiff, and formally discharging the defendant from further liability on account of the existing cause of action. It resembles an accord and satisfaction in its general nature and effect, but requires no actual valuable consideration, — such consideration being imported by the seal. A release by one co-plaintiff, or to one joint defendant, is binding as to all.

Rem. An award unperformed does not affect the substance of the cause of action though it may change its form, and it may still become the basis of a suit. A judgment unsatisfied *merges* the original cause of action and to that extent avoids it; but is itself the cause of further actions of debt or *scire facias*.

READ: Andrews, American Law, § 764;
Addison on Torts, pp. 52–56;
Jaggard on Torts, §§ 103–109;
2 Greenleaf, Evidence, §§ 28–33, 69–81;
2 Parsons, Contracts, pp. 681–716, 729–734;
Foster's First Book of Practice, pp. 273–289.

§ 284. Of the Special Defences in the Actions of Assumpsit, Debt, and Covenant.

The *special defences* in actions of assumpsit, debt, and covenant either deny that the alleged contract was ever made, or deny that it was ever broken, or assert that after it was broken the cause of action arising from its breach was extinguished. If the alleged contract was an *implied or a quasi contract a denial that it was ever made* involves either (1) a denial that the circumstances, claimed by the plaintiff as the basis of the contract, ever existed; or (2) a denial that the law would imply the alleged contract or obligation from the circumstances which did in fact exist; or (3) an assertion that even if in ordinary cases the law would imply the contract from the cir-

cumstances, yet in this case the plaintiff is estopped to claim that such a contract was implied. If the alleged contract was an *express contract, a denial that it was ever made* either (1) affirms that the defendant never entered into such a contract; or (2) asserts that though apparently he entered into the agreement, still he was not bound thereby, either (*a*) because through infancy, lunacy, drunkenness, coverture or duress, he was incapable of making, or the plaintiff was incapable of accepting, the promises in question; or (*b*) because the promise was made without a valuable consideration; or (*c*) because the subject-matter of the promise was illegal or inherently impossible; or (*d*) because the promise was not in legal form under the Statute of Frauds or other provisions of the local law; or (*e*) because the defendant was induced to make the promise by the fraudulent conduct of the plaintiff. A *denial that the contract was ever broken* asserts either (1) that the contract was rescinded between the parties before the time for its performance had arrived; or (2) that it was so altered by the agreement of the parties, before the time for its performance, that it no longer answered the description now given of it by the plaintiff; or (3) that its subject-matter became illegal before the time for performance; or (4) that the plaintiff has failed to perform some act which, by the terms of the contract or by its necessary implications, was made a condition precedent to performance by the defendant; or (5) that the defendant completely fulfilled his obligations under the contract before or at the time fixed for its performance; or (6) that at the time fixed for performance the defendant tendered performance to the plaintiff and the plaintiff refused to accept it. The defence that after the *cause of action arose* out of the breach of the contract it was *legally extinguished* affirms either (1) that after the date fixed by the contract the defendant performed the contract obligation to the acceptance of the plaintiff; or (2) that an accord and satisfaction had taken place between the plaintiff and defendant; or (3) that the defendant was absolved from liability to the plaintiff by a judgment in an action of garnishment; or (4) that the defendant had made a tender of payment or performance with interest and costs; or (5) that there had been a substitution, by agreement of the parties, of

a new contract for the one already broken; or (6) that the matter in dispute had been submitted to an arbitration and the award had been performed; or (7) that a former judgment on the same subject-matter had been obtained and satisfied; or (8) that the plaintiff had released the defendant from his liability for the breach of contract; or (9) that the plaintiff, after the cause of action had accrued, was guilty of conduct working an estoppel.

Rem. These defences are all alike applicable to actions of assumpsit, debt, and covenant, except that in covenant no want of consideration, and no parol discharge or alteration of the contract, can be alleged. The mode of pleading these and other special defences varies with the different forms of action in which they may be urged.

READ: Chitty on Pleading, pp. 486–489, 492–516.

§ 285. Of the Special Defences in Actions of Account.

An action of account presents two issues: *first*, whether the plaintiff is entitled to any accounting from the defendant; *second*, whether any balance of account is due to the plaintiff, and what is its amount. Upon the *first issue the defences* are: (1) that no relation ever subsisted between the plaintiff and defendant, whether by contract or as agent, trustee, co-tenant, partner, or otherwise, by which the defendant became liable to account to the plaintiff; or (2) that the liability to account had been released by a subsequent agreement between the parties; or (3) that a proper accounting had already been made. Upon the *second issue* all the contract obligations of the plaintiff and defendant toward each other are subjects of assertion and denial.

Rem. The contract obligations examinable in an action of account, after the liability to account at all has been decided, are the same as those in controversy in actions of assumpsit, debt, and covenant; and, therefore, the defences applicable in those actions are equally appropriate to the second issue in the action of account.

READ: Chitty on Pleading, p. 516.

§ 286. Of the Special Defences in Actions of Trespass.

The special defences in *actions of trespass* are two: *first*, that no cause of action ever existed; *second*, that whatever cause of action may have once existed has since been extinguished. In *trespass quare clausum fregit* the original existence of the cause of action is denied by affirming either (1) that the plaintiff at the time of the alleged trespass had no possession of the land, or no such possession as he could lawfully assert against the defendant; or (2) that the defendant never entered on the land; or (3) that, though he entered, it was in pursuance of legal process, or under an express or implied license from the plaintiff. In *trespass de bonis asportatis* the original existence of the cause of action is denied by asserting either (1) that the plaintiff at the time of the alleged asportation had no possession of the goods, or no such possession as he could lawfully set up against the defendant; or (2) that the defendant did not asport or destroy the goods; or (3) that though he did asport the goods it was in pursuance of legal process or by license of the plaintiff. In *trespass vi et armis* for injury to the person the original existence of the cause of action is denied by affirming either (1) that the alleged acts of violence were never committed against the plaintiff by the defendant; or (2) that, though committed, they were committed (*a*) in necessary self-defence; or (*b*) in the lawful removal of a trespasser; or (*c*) in the service of legal process; or (*d*) as part of an inevitable accident; or (*e*) by license of the plaintiff; or (*f*) in the discharge of some parental or other legal duty. In actions *per quod servitium amisit* the original existence of the cause of action is denied by asserting either (1) that no family relationship existed by which the plaintiff was entitled to the society or services of the person injured by the defendant; or (2) that the defendant never inflicted the injury described; or (3) that the injury which was inflicted was justifiable in law, for that it was (*a*) in necessary self-defence; or (*b*) an act of necessity or charity; or (*c*) in the service of legal process; or (*d*) by the express or implied license of the plaintiff. In all forms of trespass the defences claiming that the original cause of action has been extinguished are (1) accord and satisfaction;

(2) arbitration and award; (3) former recovery; (4) release; and (5) estoppel.

Rem. The injury inflicted by a trespass upon property, whether real or personal, is an invasion of the rights of possession, not necessarily of the rights of ownership. The injury is, therefore, complete if *possessory rights* are violated, and in an action for the injury it is sufficient for the plaintiff to allege and prove, as for the defendant to deny and disprove, the lawful possession of the plaintiff at the time the injury is said to have been committed. Where questions of ownership are raised in such actions it is for the purpose of supporting or contradicting the claim of lawful possession on which the plaintiff's right of action depends.

READ: Chitty on Pleading, pp. 534–542.

§ 287. Of the Special Defences to Actions of Trespass on the Case.

In actions of *trespass on the case* the defences which deny the original existence of the cause of action differ according to the nature of the cause alleged, namely; whether it was a wrongful act producing indirect and consequential injuries, or was the mere omission of a legal duty. If it were a wrongful act, producing *consequential injuries*, its defence consists in a denial (1) that the described act was performed by the defendant; or (2) that it resulted proximately in the alleged injurious consequences; or (3) that the described act was unlawful. If it were the *omission of a legal duty* the defendant may deny either (1) the existence of the legal duty; or (2) the neglect of duty; or (3) the occurrence of the alleged injurious consequences; or (4) that the alleged injurious consequences would have resulted from the neglect had not the plaintiff by his own negligence contributed thereto. The defences which avoid the cause of action are (1) accord and satisfaction; (2) arbitration and award; (3) former recovery; (4) release; and (5) estoppel.

Rem. Actions on the case often involve *questions of contract* growing out of transactions in which fraud, negligence, and other indirect wrongs are made the basis of complaint. In these the same issues may be raised, and the same defences made, as in actions *ex contractu*.

READ: Chitty on Pleading, pp. 518–530.

§ 288. Of the Special Defences in Actions of Trover.

In actions of *trover* the original existence of the cause of action is denied on the ground either (1) that at the time of the alleged conversion the plaintiff had no actual possession of the property described, and no right of immediate possession which he could assert against the defendant; or (2) that the alleged conversion never occurred, either (a) because the defendant never assumed to exercise any dominion over the property; or (b) because the dominion which he exercised was lawfully assumed in his capacity of owner, bailee, licensee, or officer serving legal process. The defences claiming the avoidance of the cause of action are (1) accord and satisfaction; (2) arbitration and award; (3) former recovery; (4) release; and (5) estoppel.

Rem. Conversion like trespass invades only possessory rights, and ownership is, therefore, not in issue nor properly in evidence except as it may tend to show possession, or a right to immediate possession, at the date of the alleged conversion.

READ: Chitty on Pleading, pp. 530–534.

§ 289. Of the Special Defences in Actions of Replevin and Detinue.

Defences denying the cause of action in *replevin* and *detinue* are (1) that at the time of the alleged seizure or detention the plaintiff had no actual possession of the chattels, and no right of immediate possession which he could maintain against the defendant; or (2) that the defendant did not seize or did not detain the chattels; or (3) that the seizure or detention which occurred was lawful, being either (a) a levy of distress; or (b) a seizure under legal process; or (c) a taking or detention by license of the plaintiff; or (d) a detention in the exercise of the legal rights of a bailee, or of a finder without knowledge of the true owner. Defences avoiding the cause of action are (1) accord and satisfaction; (2) arbitration and award; (3) former recovery; (4) release; (5) estoppel.

Rem. Proceedings in the application of extra-judicial remedies to the protection or recovery of property, such as recaption, the abatement of nuisances, and the like, are of the nature of

legal process and may be urged as defences under that general class in actions of trespass, trover, and replevin. In replevin, where the defendant not only defends his own acts but claims a return of the replevied property, his defence assumes a two-fold aspect, — as to one of which he is a true defendant, and as to the other a true plaintiff seeking the vindication of his own rights in the property.

READ: Chitty on Pleading, pp. 516, 533, 534.

§ 290. Of the Special Defences in Actions of Ejectment.

In actions of *ejectment* a denial of the cause of action asserts either (1) that at the time of the alleged wrongful entry of the defendant the plaintiff had no actual seisin or possession of the land, either by himself or by his tenant, and neither at that time nor at any subsequent time has had a right to its immediate possession as against the defendant; or (2) that the defendant never entered on the land; or (3) that the defendant's entry was not a disseisin or an ouster, but a mere trespass; or (4) that the defendant entered lawfully, either (a) in his own right; or (b) in the right of one whose title was superior to that of the plaintiff; or (c) in pursuance of a judgment in his favor to which the plaintiff was a party or a privy. In avoidance of the cause of action the defences are (1) accord and satisfaction; (2) arbitration and award; (3) former recovery; (4) release; and (5) estoppel.

Rem. In actions of ejectment the title to the land is called in question, since the injury for which the action is brought is not a mere *trespass*, but is the assertion by the intruder of his own rights of ownership in the land, either as a freeholder with seisin or as the tenant of an estate less than freehold. When the intrusion is in reality a simple trespass the action must be trespass *quare clausum*, unless the conduct and claims of the intruder are so ambiguous that the plaintiff has a right of election as to the form of action he will bring.

READ: Chitty on Pleading, p. 542.

§ 291. Of the Special Defences in Extraordinary and Auxiliary Actions.

The defences to extraordinary and auxiliary actions consist chiefly of denials of the material allegations of the petitioner.

Thus in an application for a *mandamus* they are (1) that the petitioner has no legal interest in the performance of the act for whose enforcement he applies; or (2) that he has other adequate remedies for its non-performance; or (3) that the act itself is of a mere private, not a public, character; or (4) that the act is discretionary, not obligatory; or (5) that the act is impossible; or (6) that the legal duty to perform the act does not devolve upon the respondent; or (7) that the act has already been performed. In an application for a *procedendo* the defence may be (1) that no such suit is pending in the inferior court; or (2) that the suit is not delayed; or (3) that the delay is justifiable, for causes named; or (4) that the petitioner has no such interest in the suit as entitles him to ask for this relief. In an application for a *prohibition* the respondent may affirm (1) that no such action as that of which the plaintiff complains is contemplated or in progress; or (2) that such action is within the jurisdiction of the respondent; or (3) that the petitioner has no interest which will be affected by such action; or (4) that the petitioner has another adequate remedy. In an application for a *quo warranto for the usurpation of an office* the defences are (1) that the office is not public, but private; or (2) that the respondent does not hold or claim the office; or (3) that the respondent is the lawful incumbent; or (4) that the petitioner has no such interest in the office as entitles him to interfere. In a *quo warranto for the usurpation, non-user, or abuse of a franchise* the defence consists (1) in a denial of the alleged acts or omissions; or (2) in their justification. In an application for a *habeas corpus* the respondent may (1) deny the imprisonment; or (2) assert its lawfulness as (a) in the exercise of a family right; or (b) in pursuance of legal process. In an action of *garnishment* the defences embrace every claim, negative or positive, which might have been set up by the garnishee, if he had been sued by his original creditor or bailor. In a *scire facias to enforce a record* the defence may be (1) that the obligation evidenced by the record has already been fulfilled; or (2) that it has been avoided (a) by an accord and satisfaction; or (b) by the substitution of some other obligation; or (c) by release; or (d) by estoppel. In a *scire facias to vacate or set aside a record* the defence either

(1) denies the facts on which the claim is based; or (2) controverts the legal doctrines by which the petitioner supports his claim; or (3) urges an estoppel. In a *writ of error* the defendant may affirm (1) the conformity of the proceedings in all respects to the rules of law; or (2) that whatever errors were committed, none of them were prejudicial to the plaintiff. To these actions, as well as to the ordinary suits at law, the universal defences based on want of jurisdiction, or an improper institution of the suit, are applicable.

Rem. Statutory actions are either ordinary actions, extended in their operation and effect by the provisions of local statutes; or they are new and peculiar actions created by statute, and more or less analogous to ordinary actions in their scope and methods of procedure. The special defences in these actions are the same as those in ordinary actions so far as the analogy obtains; as to their peculiar features they are governed by the local law.

READ: Chitty on Pleading, p. 513.

§ 292. Of the Defences under the New Procedure.

All those defences which affect the substance of the controversy, denying the existence of the alleged cause of action or asserting its avoidance, are the same under the *New Procedure* as under the ancient rules of the common law. So also are those defences which allege a want of jurisdiction in the court, or dispute the right of action on the ground of a joint wrongful enterprise, or equal fault, or the Statute of Limitations, or an estoppel. Defences based on the improper institution of the suit or on the want of capacity in the parties to sue and be sued, or on the insufficiency of the process or its service, or on the immaturity of the cause of action, or on the pendency of a prior suit likewise have the same significance in both forms of Procedure. But defences arising from the non-joinder, misjoinder, or misdescription of parties have lost their practical importance under the New Procedure, since the absence of necessary parties is curable by their addition; the presence of unnecessary parties by their dismissal; and the misdescription of the parties by amendment.

Rem. Under the New Procedure also a wide latitude is given to the introduction of cross-actions by the defendant, — such

as the *set-off* of debts in his own favor against those sued on by the plaintiff; or the *recoupment* of damages for the nonfulfilment by the plaintiff of some part of the contract which forms the subject-matter of the controversy; or a *counterclaim* for an independent wrong which he has sustained from the plaintiff. These cross-actions, some of which were introduced by statute into the common-law procedure, have a double aspect, — as suits against the plaintiff and as defences against the plaintiff's action; and are in the nature of an accounting which leaves a balance only to be paid to the prevailing party to the suit.

READ: Andrews, American Law, §§ 635–641;
Bliss on Code Pleading, §§ 323–364;
Maxwell on Code Pleading, pp. 396–549.

SECTION III

OF THE PARTIES TO ACTIONS IN THE COURTS OF COMMON LAW

§ 293. Of the Parties-Plaintiff in Actions Ex Contractu.

In every ordinary action in the courts of common law the *party-plaintiff* must be the person or persons whose legal right has been violated by the alleged wrong. In actions *ex contractu* the right violated by the wrong is that of the person in whom the legal interest in the contract was vested at the time the contract was broken. This person may be the original promisee, or one to whom the legal interest in the contract has been transferred by assignment or by operation of law. Where one person has a legal, and another an equitable, interest in a contract at the time of the breach only the former can be plaintiff in an action at law; the remedy of the latter, if he has any, is in a court of equity. Where the legal interest in a contract vests in *several persons* jointly, and not severally, they must all be plaintiffs; where it vests in them severally, and not jointly, they cannot join but each must bring his separate action. Where of several persons, who had a joint legal interest in a contract, some are dead the survivors only constitute the plaintiff; and where a person dies, in whom resided a sole or several legal interest in a contract, his executor or administrator is the proper plaintiff. An assignee in bankruptcy should be made plaintiff in actions upon contracts in which the bankrupt has a legal interest. In suits upon con-

tracts in which a married woman has a legal interest her husband is the proper plaintiff in the absence of a statute conferring upon her the power to sue, — she being joined with him as plaintiff in actions upon contracts made by her before her coverture, and in actions for rent and other obligations in respect to her freehold estates in real property which had accrued to her while still unmarried.

Rem. Every action at law requires the participation of two, and of only two, antagonistic parties. A party to an action may consist of any number of persons if they are so related to one another as to be able legally to claim a single right, or to commit a single wrong. Any person may be a plaintiff or defendant, unless some abnormality of status deprives him of the capacity to sue or of the liability to be sued. *Incapacity to sue* ordinarily attaches to infants, the insane, persons under guardianship, married women, and alien enemies. *Immunity from suit* resides in the State considered as a corporation, in the ambassadors and other diplomatic representatives of foreign States, and in higher judicial officers in reference to acts within their jurisdiction. In every common-law action certain persons stand in such relations to the legal right invaded that they, and they only, must be made plaintiffs; other persons occupy such relations to the wrong that they and all of them may be, and in certain cases must be, parties-defendant. Any omission of the necessary parties, or any insertion of unnecessary parties, would be fatal to the action, unless the error were cured by amendment, since it is essential to a proper and just judgment that the true parties and no others should be before the court as litigants.

READ: Andrews, American Law, §§ 686–700, 709;
Chitty on Pleading, pp. 2–38;
Stephen on Pleading, §§ 19–27, 33, 34, 43;
Gould on Pleading, ch. iv, §§ 52–65;
Perry on Pleading, pp. 116–124;
Shipman on Pleading, §§ 26–29.

§ 294. Of the Parties-Defendant in Actions Ex Contractu.

The *party-defendant* in an action at law must always be the person or persons by whom the alleged wrong has been committed. In actions *ex contractu* this is the person on whom rested the obligation to fulfil the contract, and by whom therefore, if by any one, the contract has been broken. If the contract was an express contract the duty to fulfil it rests upon the prom-

isor by whom it was originally made; if it was an implied or a *quasi* contract, the obligation to perform it is imposed upon the person who, under all the circumstances of the case, is subject to the legal liability. Several persons binding themselves jointly by their contract must be joined also as defendants for its breach, provided all survive; if some are dead, only the others are named as defendants. Where each of several parties to the same contract is severally and not jointly bound thereby each must be sued separately for his own breach. Where the contract is several as well as joint each may be separately sued or all may be made joint defendants in one action, as the plaintiff may elect; but the plaintiff cannot sue some separately and the others jointly. If a promisor dies leaving his contract unfulfilled and his liability for non-performance legally survives him, — as it may in contracts affecting property rights, — the true defendant is his executor or administrator. In actions on the contracts of a married woman made before her marriage, and in reference to which her liability continues during coverture, her husband must be joined with her as a defendant.

Rem. Where the relation of persons to a contract is altered by *novation*, in which a new promisor is substituted for the one bound by the original agreement, the new promisor must be made defendant in a suit upon the contract, although the terms and obligations of the contract itself remain unchanged, since the novation operates to discharge the former obligor from further liability.

READ: Andrews, American Law, §§ 701, 702;
Chitty on Pleading, pp. 38–68;
Stephen on Pleading, §§ 35, 36, 43;
Gould on Pleading, ch. iv, §§ 66–73;
Perry on Pleading, pp. 124–130;
Shipman on Pleading, §§ 26–29.

§ 295. Of the Parties-Plaintiff in Actions Ex Delicto.

In actions *ex delicto* for wrongs against the rights of personal security and personal liberty the proper plaintiff is the person whose security or liberty has been invaded. Where several persons have suffered in these rights, by the same act of the same defendant, each must bring his separate action unless

as may sometimes occur, the loss resulting from the injury is joint. In actions for wrongs against the right of property the plaintiff must be the person or persons whose legal interest in the property, as owner or possessor, has been affected by the alleged injury. Where this legal interest is vested in several persons jointly all together constitute the joint plaintiff; but where each has a several interest each must sue alone. Where the legal interest is in one person, and the equitable interest in another, only the former can be plaintiff in a suit at law. In an action *ex delicto* which survives the injured party, — as do many of those which lie for injuries to property, — the executor or administrator of the decedent is the proper plaintiff; but where of several persons, who were jointly interested in the property at the date of the injury, some are dead only the survivors can be joined as plaintiffs. In actions for the violation of family rights that party to the family relation, whose legal right in the other party has been infringed by the defendant, must be the plaintiff.

Rem. Rights of action *ex delicto* are sometimes assignable in connection with an assignment of the property upon which the injury has been inflicted, — as where the right to sue for past infringements of a patent may be transferred with the patent to an assignee. In such cases the assignee may bring the action in his own name as plaintiff.

READ: Andrews, American Law, §§ 703, 704;
Chitty on Pleading, pp. 68–85;
Stephen on Pleading, §§ 37, 38, 43;
Gould on Pleading, ch. iv, §§ 52–57;
Perry on Pleading, pp. 130–132;
Shipman on Pleading, §§ 30, 31.

§ 296. Of the Parties-Defendant in Actions Ex Delicto.

In actions *ex delicto* the person who commits the injury, whether by himself or his agents, must be made defendant. Where several persons join in the same wrongful act each may be separately sued, or all may be joined in one action, as the plaintiff may elect. Upon the death of the wrongdoer, if the action survives, — as it may when the wrong has benefited his estate, — his executor or administrator should be made defendant. In actions brought against a married woman, for

torts committed by her either before or after marriage, both husband and wife must be named as defendants unless the local statutes otherwise provide.

Rem. Wrongs whose effects terminate upon personal rights die with their perpetrator, and hence as a general rule no action will lie against the estate of a deceased person for injuries inflicted by him in his lifetime on the persons and reputation of other parties. But where his wrongful conduct has increased the value of his surviving estate as in some cases of trespass or conversion, and particularly where the unlawful increment is separable from his other property, his legal representatives may be compelled by proper action to make direct restitution or adequate compensation for the wrong.

READ: Andrews, American Law, §§ 705–707;
Chitty on Pleading, pp. 86–105;
Stephen on Pleading, §§ 39–41, 43;
Gould on Pleading, ch. iv, §§ 66, 74–78;
Perry on Pleading, pp. 132–134;
Shipman on Pleading, §§ 30, 31.

§ 297. Of the Parties to Extraordinary and Auxiliary Actions.

Extraordinary and auxiliary actions being intended in all cases to compel some person — natural, artificial, or official — to do or to refrain from doing some act in aid of the rights of some other person, public or private, — the *party-plaintiff* must always be the person whose right it is the object of the action to protect, or some one moving in his name or on his behalf. The *party-defendant*, for the same reason, must be the person by whose act or forbearance the rights of the plaintiff are to be vindicated or preserved. Subject to this general rule, the more precise designation of the parties depends upon the exact purpose for which the suit is brought.

Rem. In extraordinary and auxiliary actions all the persons whose rights and interests are to be directly affected by the final decision of the controversy have a right to appear and be heard, and therefore must at some stage of the action have an opportunity to become parties to the suit. The action must be instituted by the person who seeks the intervention of the law, or by some one on his behalf; and against the person whose conduct deprives the plaintiff of the enjoyment of his rights; but as the interests of other persons appear from time to time to be involved they also must be made plaintiffs or defendants as the circum-

stances may demand. These proceedings may thus take a range indefinitely wide, until complete justice to all parties is finally attained.

READ: Maxwell on Pleading and Practice, §§ 451–461, 767–772, 793, 794, 806–817, 976–978, 987;
Foster's First Book of Practice, pp. 245–250, 256–260, 269;
Bliss on Code Procedure, §§ 449, 455, 460.

§ 298. Of the Parties to Actions under the New Procedure.

The *New Procedure*, in reducing all actions to one common form, has varied the rules concerning parties to correspond with the far greater latitude allowed in courts of equity. The rules of this Procedure permit the *real party in interest* — that is, the person to whom the benefits of the action, if successful, would accrue — to be the party-plaintiff in all actions *ex contractu*. They allow *one person to sue on behalf of many* where all have a common interest, or where they are too numerous to be grouped together in one suit, and yet to afford to each a separate remedy would require an unreasonable multiplicity of actions. They sanction the *joinder of parties* who have a common though not always a joint interest or liability; and authorize the plaintiff to summon as defendants those persons who ought to be, but refuse to be, his co-plaintiffs. They also adopt the provisions of many special statutes conferring upon persons, equitably interested in the subject of the controversy, the right to bring an action in the name of the person having the legal interest, even against his will, and to control the action as far as may be necessary to protect their equitable estates.

Rem. These general features of the *New Procedure* are modified and extended in many particulars by the local statutes, customs, and rules of court of the States in which this *Procedure* has been adopted. These rules form part of the attempt to make the procedure of the courts of common law conform to the simplicity and flexibility of the procedure of equity and admiralty courts, without entirely sacrificing the brevity and precision of the ancient methods. The success of the experiment is yet to be determined.

READ: Andrews, American Law, §§ 635–641;
Stephen on Pleading, §§ 28–32;
Bliss on Code Pleading, §§ 20–71, 82–95;
Maxwell on Code Pleading, pp. 20–67.

SECTION IV

OF THE PROCEDURE IN ACTIONS IN THE COURTS OF COMMON LAW

§ 299. Of Process: its Service and Return.

The first step in the institution of an action at law is the issue of process and its service upon the defendant, notifying him to appear in court and answer to the plaintiff's claim. *Process* is a general term, embracing all the formal mandates of the court which are issued during the progress of a cause, in order to bring persons or property within its jurisdiction, or to carry its decrees into effect. Process is either (1) Original Process; or (2) Mesne Process; or (3) Final Process. *Original process* is the mandate by which the defendant is directed to appear and answer. *Mesne process* includes all intermediate mandates by which the court secures the presence of persons, or the custody of property, between the issue of the original and final process. *Final process* is the mandate by which the judgment of the court is enforced. The principal forms of an original writ are: (1) the summons; (2) the *capias ad respondendum;* and (3) the attachment. A *summons* is a mandate directed to the sheriff or other proper officer, commanding him to notify the defendant to appear in court at a day named therein, which is called the *return-day,* then and there to answer to the plaintiff's claim. It is *served* by the officer by reading it to the defendant, or by delivering to him a true and attested copy thereof, or by leaving such a copy at his last usual place of abode, or in such other manner as the local law may direct. In actions *in rem,* under the laws of some of our States, if the defendant cannot be found and has no usual place of abode within the jurisdiction of the State, service may be made by publishing a copy in some designated newspaper. A *capias ad respondendum* is a mandate directing the officer to arrest the body of the defendant, and safely keep him until he is discharged by due course of law. It is served by the officer by taking the defendant into his physical custody, and detaining him until he is enlarged on bail, or committed to prison in satisfaction of the judgment, or released on *habeas corpus*

or by other lawful methods. This process is available only in cases where the defendant is subject to imprisonment on execution if a judgment should be obtained against him. An *attachment* is a mandate directing the officer to seize and hold the property of the defendant so that it may be forthcoming at the levy of the execution. It is served by the officer by taking the property into his manual possession so far as its nature and situation will permit, and holding it until it is released by further proceedings or appropriated to satisfy the judgment in the suit. In both the capias and the attachment a summons is incorporated, unless a formal summons has been previously served. The officer, having obeyed the mandate of his process, must then *make his return* thereon by endorsing on it a short account of his proceedings under it, and leave the endorsed process, on or before the return day, with the clerk of the court.

Rem. Original and final process, and such mesne process as may be directed against the defendant or his property, are known as *writs*. In ancient times suits were commenced by an original writ, issuing out of chancery in the king's name, stating the cause of action in a few words, and commanding the officer to whom it was directed to order the defendant to satisfy the plaintiff's claim; and, if he failed to do so, to summon him to appear in court at a day named in the writ. If the defendant neither complied with the order, nor appeared in court, a second writ issued in the form of a summons, a *capias ad respondendum*, or an attachment. Later, the practice of issuing the first writ was abandoned, and the other three became original writs. In many details the form, effect, issue, and service of these writs are regulated by local statutes. It is, however, generally the rule in all our States: (1) that the service of the summons marks the date of the commencement of the suit; (2) that no *capias* can issue in a purely contract action, nor in an action sounding in tort if it really enforces a contract liability, except it be an action for the breach of a promise of marriage; (3) that where the defendant is arrested on a lawful *capias* he has a right to be at once enlarged on common bail given to the officer, conditioned that he will appear to answer; (4) that an attachment may be granted against such property of an absconding debtor as may remain within the jurisdiction of the court, and that his chattels in the hands of his agents, trustees, or bailees, as well as his choses in action, may be reached by garnishment; (5) that

property attached or garnisheed may be released upon the substitution of adequate security. In several States an attachment may issue at the commencement of any action though the defendant may be solvent, within the reach of process, and certain to appear.

READ: 3 Bl. Com., pp. 272–292;
Stephen on Pleading, §§ 63–65, 87;
Perry on Pleading, pp. 137–158;
Shipman on Pleading, §§ 36–40;
Maxwell on Pleading and Practice, §§ 29–69, 400–450;
Foster's First Book of Practice, pp. 221–226, 233–244.

§ 300. Of Appearance and Bail.

It is the duty both of the plaintiff and the defendant to *appear in court* on the return-day of the writ. If the plaintiff fails to appear the defendant is entitled to a judgment of *nonsuit* against him, which dismisses the action and compels him to commence anew. If the defendant fails to appear the plaintiff is entitled to a *judgment by default*, which is conclusive against the defendant on the matter in controversy. Where a defendant, who has been enlarged on common bail, fails to appear his bond may be declared forfeited, and a *scire facias* brought against the surety to collect the penalty. When a defendant, who has been enlarged on common bail, duly appears to answer, the bail is discharged; but the plaintiff may obtain an order from the court to compel the defendant to give *special bail to the action*, conditioned that he will abide the final judgment of the court. Until this order is obeyed the defendant cannot answer to the suit, and after reasonable opportunity to procure bail has been given him a final judgment may be rendered against him for default of plea.

Rem. Formerly the parties appeared in court in person to assert their respective claims, and this is still permitted. But for the past seven centuries it has been customary for them to appear by their attorneys at law, who are recognized officers of the court, and whose names entered on the docket on behalf of their clients constitute a sufficient appearance for the parties, except when the client is out on common bail and must appear in person to give special bail. The appearance of a defendant may be general or special. His *general appearance* waives all objections to the jurisdiction of the court over his person, whether on

the ground of his residence, his misdescription in the writ, or defects in its service upon him. His *special appearance* enables him to take advantage of all technical errors which defeat the jurisdiction of the court; and must be made in person since his appearance by attorney admits its jurisdiction over him. A special appearance must be stated on the record to be special, or it will be presumed to be a general appearance. An appearance by the same attorney for both parties usually raises the presumption that the suit is *collusive*, and the court will then refuse to entertain it; but in amicable suits, brought to obtain the judicial interpretation of a will, a trust, a corporate charter and the like, such an appearance is sometimes permitted.

READ: 3 Bl. Com., pp. 25–29, 273, 277, 278, 282, 287, 295, 296;
Andrews, American Law, §§ 766, 771;
Stephen on Pleading, §§ 88–91;
Perry on Pleading, pp. 158, 159;
Shipman on Pleading, §§ 41–43;
Foster's First Book of Practice, §§ 226–232.

§ 301. Of the Pleadings: their Purpose, Classes, and Order.

The second step in the prosecution of an action is the presentation of the pleadings. *Pleadings* are the alternate allegations of the plaintiff and defendant, setting forth in writing their respective claims. Their *purpose* is to raise certain distinct issues of fact or law, the decision of which by the court will settle the whole matter in controversy. Every action at law consists of two assertions, and of one or more denials. The plaintiff asserts (1) that a certain state of facts exists; (2) that in view of those facts he is by law entitled to that redress from the defendant which his action claims. The defendant denies either (1) that the alleged facts exist; or (2) that even if the facts do exist the plaintiff is by law entitled to the redress he claims; and to support this second denial he asserts either (a) that the court to which the action is brought has no jurisdiction over the parties and the subject-matter of the controversy; or (b) that the action is not properly instituted; or (c) that upon the facts alleged the law affords no such redress as the plaintiff claims; or (d) that other facts exist, not stated by the plaintiff, which deprive him of the right to the redress that he could otherwise obtain. The pleading in which the plaintiff makes his two assertions is called the *declaration*.

The pleading in which the defendant denies the existence of the facts alleged by the plaintiff is called a *plea in bar.* The pleading in which the defendant denies the jurisdiction of the court is called a *plea to the jurisdiction.* The pleading in which the defendant denies the proper institution of the suit is called a *plea in abatement.* The pleading in which the defendant denies the legal right of the plaintiff to recover, even if the facts alleged exist, is called a *demurrer.* The pleading in which the defendant denies the right of the plaintiff to recover on the facts alleged, on the ground that other facts exist, not stated by the plaintiff, which deprive him of the right that he could otherwise enforce is called a *special plea in bar.* A plea to the jurisdiction, if it is to be offered at all, must precede all other pleadings except the declaration. Pleas in abatement must be presented before the pleadings which deny the matters of fact or matters of law asserted by the plaintiff. Demurrers must be offered before the general or special plea in bar that controverts the fact to which the legal question raised by the demurrer logically belongs. Pleadings not presented in their proper order are waived by the delinquent party, and the allegations which could have been denied in them are thus admitted to be true.

Rem. Pleas to the jurisdiction and in abatement are classed as *dilatory pleas,* because they delay the progress of the action. Demurrers receive their name from the same characteristic. Declarations and pleas in bar, whether general or special, and the altercations following them, are known as *pleadings to the merits of the action.* The pleas to the merits subsequent to the plaintiff's *declaration* are (1) the defendant's *plea in bar;* (2) the plaintiff's *replication;* (3) the defendant's *rejoinder;* (4) the plaintiff's *surrejoinder;* (5) the defendant's *rebutter;* (6) the plaintiff's *surrebutter.* The latter stage is seldom reached in modern pleading.

READ: 3 Bl. Com., pp. 293, 301, 310;
Andrews, American Law, §§ 646–649, 723–725;
Chitty on Pleading, pp. 235, 262, 456, 457;
Stephen on Pleading, §§ 1–18, 92, 93, 96, 97, 132–135;
Gould on Pleading, ch. i, §§ 1–25; ch. ii, §§ 1–43;
Perry on Pleading, pp. 159–164;
Shipman on Pleading, §§ 44.

§ 302. Of the Contents of Pleadings: Demurrers.

Every pleading either affirms or denies a matter of fact, or raises an issue of law by asserting that, on the facts set forth in the last pleading of the opposite party, the present pleader is legally entitled to a judgment against him. The pleading which raises an issue of law is called a *demurrer*. It may be employed at any stage in any class of pleadings. The *issue* it presents may relate either to the technical form in which the facts are stated in the previous pleading, or to the sufficiency of the facts, however stated, to sustain the legal claim in support of which they are advanced. A demurrer which rests in whole or in part upon technical errors in the previous pleading is called a *special demurrer*, and must clearly point out every error of which it complains. A demurrer which rests upon the insufficiency of the facts, however stated, is called a *general demurrer*, and need aver only that the previous pleading is insufficient in the law. Errors of form are waived unless immediately objected to by special demurrer; errors of substance, due to the insufficiency of the facts alleged, if not objected to by general demurrer, may sometimes be taken advantage of, after the trial of the case, by proceedings to arrest or reverse the judgment. A *judgment on demurrer* was formerly conclusive as to the facts recited in the previous pleading as well as to their legal sufficiency, but in modern practice the defeated party is generally allowed to amend his defective pleading, or to plead to the facts if the demurrer is overruled.

Rem. Every demurrer must pray the judgment of the court upon the question of law presented thereby. The issue thus tendered must be accepted by the opposite party, and the question is then submitted, with or without argument, to the decision of the court; and until this decision is rendered no further progress can be made in the action. In reaching its conclusions it is the duty of the court to examine the whole record, and to give judgment in favor of that party in whom the substantial right resides, unless he has distinctly based his action on some other ground.

READ: 3 Bl. Com., pp. 314–324;
Andrews, American Law, §§ 735–738, 804;
Chitty on Pleading, pp. 692–702;
Stephen on Pleading, §§ 103, 138–143, 177;
Gould on Pleading, ch. ix, §§ 1–46;

2 Greenleaf, Evidence, §§ 3–5;
Perry on Pleading, pp. 174, 232–240;
Shipman on Pleading, §§ 46, 47, 170, 186;
Bolles, Important English Statutes, p. 75, *Stat. 27 Eliz., Special Demurrers.*

§ 303. Of the Contents of Pleadings: Traverses.

A direct issue of fact is raised by a pleading called a "*traverse.*" A traverse is a formal denial of the facts affirmed in the last pleading of the opposite party. Traverses are of two classes: (1) Common traverses; and (2) Technical traverses. A *common traverse* denies all the material allegations of the previous pleading. A *technical traverse* contains both an affirmation and a denial; an affirmation or *inducement* alleging some new matter, or some new aspect of the matter previously alleged, or some distinct portion of such previous matter; and then a denial of whatever else that pleading may contain. This technical traverse is employed whenever the pleader cannot safely admit or deny the allegations of the previous pleading as a whole, and enables him to admit a portion and deny the rest. A common traverse, and a technical traverse which does not allege new matter, tender an issue in which the opposite party is obliged to join, and the question of fact thus raised is presented to the court or jury for determination.

Rem. A technical traverse may be either general or special. A *general technical traverse* contains a general assertion of matters contradicting the material allegations of the previous pleading, and then in general terms denies those allegations. For example, where the defendant in an action for an assault has pleaded that he made the assault in self-defence. Here the plaintiff cannot answer by a common traverse, for this would deny the assault as well as the defendant's justification, and so defeat the action altogether. He therefore resorts to a general technical traverse in which he states, — *first*, that the defendant committed the injury of his own wrong (*de injuria sua*); and *second*, that the defendant had no such justification (*absque tali causa*) as he claims. A *special technical traverse* avers some new matter, or new legal aspect of the matter already presented, in contradiction of a special allegation of the prior pleading; and then denies that allegation word for word. Thus, for example, in an action on a contract under seal, where the defendant pleads that he executed the contract under duress. Here the plaintiff cannot use a com-

mon traverse, and so deny the execution of the contract, but in a special technical traverse he can assert that the defendant executed the contract of his own free will, and not (*nec non*) by duress. Or again, in an action of trespass *quare clausum*, where the plaintiff has asserted in his declaration that the defendant entered on the land in order to serve legal process, and while there exceeded his authority and thereby became a trespasser *ab initio*. Here the defendant cannot file a common traverse, for that would deny his own official character and errand; but in a special technical traverse he can state affirmatively just what he did do on the land, without this (*absque hoc*) that those acts were in excess of his official powers. A special technical traverse does not tender an issue, but concludes with an offer to verify the new matter actually or apparently alleged, to which the next pleading may reply with a demurrer, or a traverse, or a pleading in confession and avoidance.

READ: 3 Bl. Com., p. 313;
Andrews, American Law, §§ 739, 743–750, 757;
Chitty on Pleading, pp. 631–651;
Stephen on Pleading, §§ 154–165, 168, 170–174;
Gould on Pleading, ch. vii, §§ 1–68;
Perry on Pleading, pp. 178–182, 240, 251–272, 295–302, 310–313;
Shipman on Pleading, §§ 187–190, 205–212.

§ 304. Of the Contents of Pleadings: Confession and Avoidance.

The legal effect of a pleading may be controverted, not only by a demurrer, but by alleging new and additional facts which qualify or limit the facts previously alleged, and give a different legal aspect to the controversy. The pleading containing such allegations is called a *confession and avoidance*. It begins by formally admitting the truth of the facts stated in the previous pleading, and then avers that notwithstanding those facts the party pleading them should not prevail because of other facts which it proceeds to set forth in detail. Thus in an action of trespass *quare clausum* the defendant may plead confessing the entry, and avoiding his apparent liability therefor by averring that he entered in pursuance of official duty. To this the plaintiff may in his turn reply by a similar pleading, confessing that the entry was originally lawful, and averring that the defendant having entered committed injuries which rendered him a trespasser *ab initio*. A pleading in confession and avoidance raises no issue, but must conclude with a *verification*, or offer to prove the new matter alleged. To it the opposite

party must answer with a demurrer, a traverse, or another confession and avoidance; and so onward until some question of law is presented to the court, or some matter of fact is positively asserted and positively denied.

Rem. The new matter, offered in avoidance in this pleading, must be of such a character that if it be true it affords a complete answer to the legal conclusions derived from the last previous pleading. Otherwise, it is not germane to that pleading, and may be treated as a nullity and judgment may be rendered against the party who offers it. Remotely resembling a confession and avoidance is a *protestation*, which a party employs when he deems it inexpedient, in view of future litigation, to admit matters of fact and yet cannot deny them in connection with the present suit. In such a case his pleading *protests* against the matter of fact without admitting or denying it, and then alleges the real matter on which his action or defence depends. In the current suit the protestation has no effect; it operates only to save the rights of the protestant in a subsequent action, and prevent him then from being estopped to dispute such facts by his failure to deny them in the present suit.

READ: 3 Bl. Com., p. 310;
Andrews, American Law, §§ 751, 753, 759;
Chitty on Pleading, pp. 503–506, 551–558;
Stephen on Pleading, § 164;
Gould on Pleading, ch. vi, §§ 70–74; ch. vii, §§ 57–62;
Perry on Pleading, pp. 272–279;
Shipman on Pleading, §§ 213–219.

§ 305. Of the Pleadings: their Verbal Expression.

It being the purpose of the pleadings to raise certain issues, intelligible to the court and decisive of the controversy, it is essential that in their allegations and denials they should be (1) Complete; (2) Accurate; (3) Definite; (4) Positive; and (5) Concise. *Completeness* requires that every fact which is necessary to support the legal right claimed by the pleader, including all matters of title, possession, or authority, should be fully stated, except when they are either (a) presumed by law; or (b) known already to the court through the previous pleadings or as matters of judicial notice; or (c) must hereafter be pleaded by the adverse party as the basis of his antagonistic claims. *Accuracy* requires that every statement of a material fact shall contain such particulars concerning

persons, time, place, subject-matter, quantity, quality, and value as to distinguish it from every other fact for which it might be mistaken, and to exhibit it in its true legal effect and relations. *Definiteness* requires (a) that every pleading should be consistent with itself, and thereby avoid the fault of *repugnancy;* (b) that it should set forth but one ground of action or defence, and thereby avoid the fault of *duplicity;* (c) that it should adhere to the same ground of action or defence assumed in the previous pleadings of the same party, and thereby avoid the fault of *departure;* and (d) that its language should be open to but one interpretation and thereby avoid the fault of *ambiguity. Positiveness* requires that every material fact should be (a) directly and positively affirmed; (b) not laid under a *whereas;* (c) not stated *argumentatively;* (d) not proposed as an *hypothesis;* and (e) not inserted by way of recital. *Conciseness* requires (a) that every pleading shall follow the customary forms with their proper commencements and conclusions; (b) that it shall contain only the material facts with those which are necessary to explain them, and thereby avoid the fault of *surplusage;* and (c) that it shall set forth no matters of mere law, and no particulars of the evidence by which the facts stated are to be proved.

Rem. Observance of these rules in all their stringency is not difficult if the pleader, instead of relying on his own ingenuity in the construction of his pleadings, will make diligent use of the established "*Forms and Precedents,*" which are the fruit of centuries of labor by the most accomplished pleaders in the common law courts. Many volumes of these exist and are accessible to every student of the law, and though some of them are now considered cumbersome and verbose, and have been displaced by shorter and more simple modes of statement, yet as to all the requisites of perfect pleading they are still the models from which the modern pleader cannot substantially depart without presumption and grave risk of disaster. Even where the *Code Procedure* has been adopted they furnish the verbal raiment in which all the material allegations of the pleadings should be clothed.

READ: 3 Bl. Com., pp. 308, 310, 311;
Andrews, American Law, §§ 731–734, 752–756, 759–763;
Chitty on Pleading, pp. 236–260, 558–567;
Stephen on Pleading, §§ 165–167, 175–260;

Gould on Pleading, ch. iii, §§ 1–198; ch. viii;
Perry on Pleading, pp. 295–432;
Shipman on Pleading, §§ 166–169, 180–185, 220, 233–249, 258–270, 308–359.

§ 306. Of the Pleadings: their Interpretation.

The *meaning of a pleading* is fixed by the interpretation given to it by the court; and this interpretation leans most strongly against the pleader and in favor of his adversary. Hence he is conclusively *presumed to admit* every material allegation of the previous pleading which he does not in his own pleading expressly deny. If his own *pleading is bad in one part* it is not aided by any other part but is bad as a whole, unless its defect is cured by an admission of the same matter in a subsequent pleading of the adverse party. If he traverses an entire previous pleading, which contains both immaterial and material allegations, his traverse is applied to the material facts as limited and qualified by the immaterial and not to the material as standing by themselves; and thus admits the truth of the material. But purely immaterial assertions do not vitiate the pleading in which they are contained, unless they are so connected with the material allegations as to render them objectionable.

Rem. The rigidity with which these rules of interpretation are applied is well exemplified in that error in pleading known as a "*negative pregnant.*" This occurs when material allegations are limited or qualified by immaterial statements in the same pleading. Thus in an action for an assault on a certain day, the allegation of the assault is material; the allegation that it was committed on that specific day is immaterial. Now, if the defendant in his pleading denies that he committed an assault on that day, this is taken as an admission that he committed an assault on some day and as a denial only that it was committed on the specific day named. Such a pleading is a denial containing an admission; a negative, pregnant with an affirmative.

READ: Chitty on Pleading, pp. 260–263, 571–574;
Stephen on Pleading, § 243;
Gould on Pleading, ch. iii, § 169;
Perry on Pleading, pp. 383–386, 401, 402, 412–414;
Shipman on Pleading, §§ 342–344, 351.

§ 307. Of the Pleadings to the Jurisdiction.

Objections to the jurisdiction of the court may be based upon a want of jurisdiction over the person of the defendant or upon a want of jurisdiction over the subject-matter of the controversy. A *want of jurisdiction over the person* of the defendant may be waived by him, and will be waived unless he appears in court by a special appearance and takes some steps to have the suit dismissed. Where the defect of jurisdiction is *apparent on the face of the proceedings* he may insist on the objection by a *simple motion*, made orally or in writing according to the custom of the court. Where the defect is *not apparent on the record*, but requires the presentation of new matters of fact, he must *allege these by a pleading*, in which they are set forth with the highest degree of completeness, accuracy, and definiteness. To this pleading the plaintiff may reply by a demurrer, traverse, or confession and avoidance; and from thence the pleadings will proceed until an issue is reached. A *want of jurisdiction over the subject-matter of the controversy* cannot be waived, but must be noticed by the court, whenever and however brought to its attention, and the suit at once dismissed. If the defendant is aware of the defect when he appears to answer he may raise the objection by a motion or a plea according to the disclosures of the record; but should he remain silent the proceedings will still be invalid. Similar pleas or motions are employed where jurisdiction, though not wholly wanting, is suspended by operation of law, — as when a war prevails between the nations to which the parties respectively belong. An order of the court dismissing a suit for want of jurisdiction is not a judgment in favor of either party, and can contain no direction as to their future conduct and no award of costs.

Rem. Many of the proceedings in a court of justice are carried on by means of motions. A *motion* is an occasional application to the court, by the parties or their counsel, in order to obtain some rule or direction of the court which becomes necessary to the progress of a cause. A motion is not a pleading, and does not become part of the record, unless the ruling of the court upon it raises some question of law which is subject to review upon a writ of error. Whether it shall be made orally or in writing; whether it can be heard without previous notice to the adverse party; whether it must be supported by parol testimony or written affida-

vit; and numerous other details concerning its form and mode of presentation and determination; are regulated by the rules of practice established by the court, and not by any general law.

READ: Andrews, American Law, §§ 711–722, 726, 727, 765, 767;
Chitty on Pleading, pp. 457–462;
Stephen on Pleading, § 98;
Gould on Pleading, ch. v, §§ 1–30;
Perry on Pleading, pp. 175, 420, 421;
Shipman on Pleading, § 49;
Maxwell on Pleading and Practice, §§ 20–28, 138–158;
Foster's First Book of Practice, pp. 363–367, 398–406.

§ 308. Of the Pleadings in Abatement.

Objections to the mode in which the action has been instituted are ordinarily made by *pleadings in abatement;* though where such objections are also fatal to the cause of action, however the action might be instituted, they may be reserved for a pleading on the merits. If such objections are apparent on the record they may, in some States, be brought to the attention of the court by a motion to quash. A *plea in abatement* is a formal pleading in which the defendant sets forth with the highest degree of completeness, accuracy, and definiteness the facts which show that the action has been improperly instituted, and prays that on these grounds the suit may abate and be dismissed. All causes for such abatement on which the defendant expects to rely must be inserted in the plea; which must so describe the several defects that the plaintiff may be able, in another action, to avoid them if they are avoidable. To this pleading the plaintiff may demur or plead until an issue is reached for the decision of the court. Any defect relating merely to the institution of the suit and not thus made the ground of a plea or motion is waived, and unless fatal to the jurisdiction of the court over the subject-matter will not vitiate the subsequent proceedings. A *judgment sustaining a plea in abatement* formerly dismissed the action, and compelled the plaintiff to commence anew or abandon the controversy altogether; but under modern practice he is permitted to amend the defect, if it be amendable, upon the payment of such costs as the court may direct. A *judgment in favor of the plaintiff* on an issue created by a denial of the matters set up in the plea is conclusive on the merits also so far as those mat-

ters are concerned; but a judgment in his favor on a demurrer to the plea, or on new matter set up in his answer to the plea, merely orders the defendant to answer over (*respondeas ouster*) with or without the payment of costs.

Rem. Pleadings in abatement must be stated with the highest degree of certainty and definiteness. *Certainty in pleading* is said to be of three degrees: (1) Certainty to a common intent; (2) Certainty to a certain intent in general; (3) Certainty to a certain intent in every particular. A pleading is *certain to a common intent* when it is clear enough according to reasonable intendment and construction, though not worded with absolute precision. Certainty to a common intent cannot add to a sentence words which have been omitted, — the rule being one of construction only, and not one of addition. This is the lowest form of certainty which the rules of pleading allow, and is sufficient only in pleas in bar, rejoinders, and such other pleadings on the part of the defendant as go to the action. *Certainty to a certain intent in general* is a higher degree than the last and means what, upon a fair and reasonable construction, may be called certain without recurring to possible facts which do not appear except by inference or argument; and is what is required in declarations, replications, and indictments (in the charge or accusation), and in returns to writs of mandamus. *Certainty to a certain intent in every particular* requires the utmost fulness and particularity of statement, as well as the highest attainable accuracy and precision, leaving nothing to be supplied by argument, inference, or presumption, and with no supposable answer wanting. The pleader therefore must not only state the facts of his own case in the most exact way, but must add to them such other facts as will anticipate the claims of his adversary. This degree of certainty is required only in the case of pleas in estoppel and dilatory pleas.

READ: 3 Bl. Com., pp. 301–303;
Andrews, American Law, §§ 728, 730;
Chitty on Pleading, pp. 257–260, 462–485;
Stephen on Pleading, § 100;
Gould on Pleading, ch. v, §§ 31–159;
Perry on Pleading, pp. 176–178, 217, 283, 321, 393, 396, 424;
Shipman on Pleading, §§ 51, 223, 224, 464, 465, 494;
2 Greenleaf, Evidence, §§ 18–27.

§ 309. Of the Pleadings to the Merits of the Action: the Declaration.

The *pleadings to the merits* of the action consist of the declaration, in which the plaintiff states his claim; and the subsequent

pleadings of both parties, through which a decisive issue is finally attained. Of these pleadings, the first in order is the *declaration,* which is filed at the commencement of the suit or at the time of the return of the process into court. The *purpose of the declaration* is to set forth the cause of action in such a manner that the defendant may know what he has to answer; that the jury may be able to give a verdict completely covering the matters in dispute; and that the court may render a judgment which terminates the controversy. It *must, therefore, contain* in legal form, and with all the necessary technical averments, a clear and concise allegation of the facts which constitute the cause of action, of the damage which the plaintiff has sustained thereby, and of the remedy for which he seeks. When these material facts require further explanation, by the recital of other facts which in themselves are immaterial, such facts must be stated *by way of inducement* or preparation for the assertion of the material facts. When the injury has resulted in peculiar damage to the plaintiff, over and above its natural consequences in ordinary circumstances, the character of such damage and its relation to the injury must be specially set forth as *matter of aggravation.* Where the *right invaded by the injury* is an absolute personal right it need not be described, since of the existence of all such rights in every person the court will take judicial notice; but every property or family or official right must be averred, with a description of the object or relation to which it pertains. Where *property was the subject of the injury* it must be sufficiently identified by stating its location, quantity, quality, or value, in order to show that the court has jurisdiction of the matter of the suit, and to indicate the nature and extent of the injury it has received. The *wrongful actions or omissions of the defendant* must be distinguished by allegations of their time and place; and these allegations must be true whenever the date of the transaction is essential to the right of action, or the place of its occurrence determines the jurisdiction of the court. Where the wrong done is of an enduring character, like a protracted nuisance, it should be laid with a *continuando,* — that is, as having been commenced at a certain date and as having thence continued until another specified date, or until the institution of the suit. Where the

wrong consisted of distinct acts frequently recurring, like repeated trespasses, it should be described with a *repetendo*, — that is, as having been committed on a certain date and on divers other days and times between that date and another subsequently named, or the date of the commencement of the action. Whenever, in spite of these precautions, any material allegation still remains indefinite the defendant is entitled, before pleading to the declaration, to its further explication by a *bill of particulars*, or some other explanatory statement. Should the defendant, in a plea germane to the declaration as it stands, set up a defence not applicable to the cause of action on which the present suit is based, but to another transaction to which the averments of the declaration would equally apply, the plaintiff may restate his cause of action by a *novel assignment* with additional particulars, to distinguish it from that to which the plea refers, and thus compel the defendant to replead to the real matter of the suit. Every *declaration must commence* with the title of the court to which the action has been brought; the *venue* or place at which the facts are said to have occurred and over which the court has jurisdiction; the names of the parties and the official capacity, if any, in which they sue or are sued; and an averment that the defendant has been served with process to answer to the suit. It *must conclude* with a demand for damages, or for such other relief as the plaintiff deems himself authorized by law to claim; and be signed by the plaintiff or by his attorney. To every form of action belongs an established form of declaration which contains in outline all the essential averments, and which the plaintiff's attorney can readily adapt to the peculiar circumstances of his case.

Rem. In framing a declaration the pleader must regard not only the facts as they actually exist, but the testimony by which they are to be proved; since in a legal controversy no facts exist until they are established by sufficient evidence. Hence, where the pleader is in doubt whether the testimony, when produced in court, will support one or another mode of allegation he is at liberty to state his cause of action in *different counts*, each suited to some possible contingency of proof; and if supporting one by proper evidence to gain his cause on that though failing on the rest. Each of these counts is, in reality, a separate declaration,

and must possess all the attributes of a sole declaration, except in the possession of a separate commencement and conclusion, and in the right of the pleader to incorporate into one count, by reference without detailed narration, the matters stated at full length in another.

READ: 3 Bl. Com., pp. 293–296;
Andrews, American Law, § 755;
Chitty on Pleading, pp. 263–437;
Stephen on Pleading, § 94;
Gould on Pleading, ch. iv, §§ 1–51, 79–103;
Perry on Pleading, pp. 110, 164–167, 283–289, 313–317, 321–362, 417–420, 431, 432;
Shipman on Pleading, §§ 45, 95–97, 226, 252–256, 270–306, 327, 328, 349, 350, 370–376, 386.

§ 310. Of the Pleadings to the Merits: Pleas in Bar: the General Issue.

Every declaration in a common law action, if formally sufficient, is considered as a *totality* irrespective of its details, and as setting up a single cause of action for which the court under that particular form of action can apply a remedy. This gives to the declaration an artificial as well as a *unitary character*, which extends also to the formal common traverse by which the declaration as a whole may be denied. This formal common traverse is called the "*general issue.*" It differs from the ordinary common traverse, which denies the *contents* of the declaration, in that it denies not the specific allegations therein but the existence of the cause of action as *an entirety*, and the corresponding right of the plaintiff to a legal remedy. The scope of the general issue in each form of action, and the defences which may therefore be presented under it, are fixed by law. Being intended to avoid an otherwise protracted series of affirmations and denials, and bring the pleadings to an immediate issue, it always *closes to the country* by offering to go at once to trial, — which offer the plaintiff is obliged to accept. The technical knowledge required to prepare and conduct cases under this system of pleading early led, in this country, to the practice of appending to the general issue *notices* of those defences of whose precise relation to the general issue the unlearned lawyer of the defendant was not satisfied; thereby introducing into a logical and perfect system of plead-

ing such confusion and disorder as to gradually pave the way for the adoption of the *New Procedure*.

Rem. Another modern practice of similar origin and result is that of replying to the declaration with a *common traverse* or *general denial;* thus denying each and all its specific allegations, and leaving the issues thereby created, and the defences admissible under the traverse, to be ascertained by the parties and the court, as best they can, by an examination of the declaration in detail. Still another plea in bar is the "*special issue,*" which is a denial of some particular portion of the plaintiff's claim without the proof of which his suit must fail. It admits by implication all other matters claimed by him and narrows the issue to the point denied. Both the general denial and the special issue close to the country, and require a joinder of the plaintiff and the submission of the case to trial.

READ: 3 Bl. Com., pp. 305, 306;
Andrews, American Law, §§ 729, 740, 741;
Chitty on Pleading, pp. 486–490, 552;
Stephen on Pleading, §§ 102, 145;
Gould on Pleading, ch. vi, §§ 1–69;
Perry on Pleading, pp. 241–251, 312, 408–411;
Shipman on Pleading, §§ 191–194, 358;
2 Greenleaf, Evidence, §§ 1–17;
Bolles, Important English Statutes, p. 178, *Hilary Rules.*

§ 311. Of the Pleadings to the Merits: Special Pleas in Bar: Justification: Discharge.

A *special plea in bar* is, in form, either a general technical traverse, or a confession and avoidance, averring matter actually or apparently new and contrary to the legal effect of the declaration. In substance it is either a *justification or excuse* of the defendant's conduct, showing that the plaintiff never had a cause of action; or a *discharge* or *release* of the plaintiff's claim, showing that his cause of action no longer exists. All defences which are not admissible in evidence under the general issue must be presented under these special pleas. If the plea is in the form of a general technical traverse it concludes to the country. If in the form of a special technical traverse it concludes with a verification, and requires a further answer from the plaintiff. Every special plea in bar has its own formal commencement and conclusion, and its technical substantial outline and averments which the pleader is expected to observe.

Rem. Prior to the Statute of Anne (A. D. 1706) the defendant was not permitted to urge several distinct defences to the same claim of the plaintiff, on account of the complexity of issues which such proceedings would create. He could make a different defence to every separate claim, and therefore multiply his pleas in bar to correspond with the different causes of action, or with the different items of wrongdoing charged against him in the declaration; but though he might have several good defences to a single cause or item he was compelled to rely on one and abandon all the rest. This hardship was removed by the Statute of Anne which allowed him to plead, by the leave of the court, all his defences if he chose. This permission did not extend to pleadings subsequent to the defendant's answers to the declaration, nor authorize him to combine distinct defences in a single plea. Where there are several defendants, whose alleged liability is not joint, each may pursue his own line of defences by appropriate pleas.

READ: 3 Bl. Com., pp. 306–309;
Andrews, American Law, §§ 742, 743;
Chitty on Pleading, pp. 504, 542, 543, 586–602;
Stephen on Pleading, § 102;
Gould on Pleading, ch. vi, §§ 70–121; ch. viii, §§ 1–33;
Perry on Pleading, pp. 272, 317–322;
Shipman on Pleading, §§ 215, 257.
Bolles, Important English Statutes, p. 108, *Stat. Anne, Double Pleading.*

§ 312. Of the Pleadings to the Merits: the Replication and Subsequent Pleadings.

Where any pleading concludes to the country it is the duty of the adverse pleader to accept the issue tendered, and join in submitting it to trial. This is done by a pleading called the *similiter*, which states that the pleader "*doth the like.*" This is, therefore, the reply which the plaintiff is obliged to make when the defendant has answered the declaration with the general issue, or a common traverse, or a general technical traverse, or a special issue. But where the defendant has pleaded a special technical traverse, or confession and avoidance, the plaintiff must demur, or traverse, or avoid. If he demurs the defendant must join, and the issue of law thus created will then be submitted to the court for decision. If he pleads a common traverse or a general technical traverse the defendant must reply with a *similiter*. If he avoids by pleading a special

technical traverse the new matter which this introduces originates another series of affirmations and denials, which may continue as long as the resources of the case and the ingenuity of the pleaders will permit.

Rem. It is the tendency of modern practice to shorten the series of pleadings as far as possible by amending the declaration and pleas in bar, in order to complete the presentation of the claims of the parties with the plaintiff's replication. This is particularly the case in the *New Procedure*, in which it imitates the methods of the equity courts.

READ: 3 Bl. Com., pp. 309, 310;
Andrews, American Law, § 758;
Chitty on Pleading, pp. 603–607, 625–688;
Stephen on Pleading, §§ 104–107, 169;
Gould on Pleading, ch. vi, §§ 20–22;
Perry on Pleading, pp. 180, 181, 292–294, 320, 394–398, 400, 403–405;
Shipman on Pleading, §§ 55, 64–69, 188, 230–232.

§ 313. Of the Pleadings to the Merits in Actions of Assumpsit.

The declaration in an action of *special assumpsit* must set forth the contract with its parties, subject-matter, promise, and consideration; the performance by the plaintiff of all conditions precedent, the breach by the defendant, and the resulting damages. In *general assumpsit* it must describe the circumstances from which the law implies the promise, assert the promise and its non-fulfilment, and specify the damages. The *general issue* in this action is *non assumpsit*, under which it has been held that the defendant may present any defence in denial or avoidance of the cause of action except the Statute of Limitations, tender by the defendant, his discharge in bankruptcy, and estoppel; these must be offered in a special plea. In some States the scope of the general issue is more limited, and matters which admit the existence of the contract, but allege its abrogation or performance, must be set up in a pleading of confession and avoidance, or in notices appended to the general issue.

Rem. The latitude allowed to the introduction of evidence under the general issue of course rendered the plaintiff uncertain what defences would be presented by the defendant even up to the time of trial, and compelled him to prepare himself with testimony to meet all possible contingencies, — thus

incurring in many cases a vast amount of needless trouble and expense. Attempts were made to relieve this situation both in England and in this country. In England the Hilary Rules, enacted by the courts in 1834, restricted the scope of the general issue, and required the defendant to offer many of his defences in special pleas. In this country the courts obliged the defendant to give notice to the plaintiff, at a certain time before the trial, of the specific defences on which he might insist; but this rule was often evaded by giving notice of all possible defences, and then presenting evidence on as many as he chose. These inconveniences have had much influence in promoting the adoption of the *New Procedure*.

READ: 3 Bl. Com., pp. 157–166;
Stephen on Pleading, § 150;
Perry on Pleading, pp. 87–89, 110, 247–249;
Shipman on Pleading, §§ 98–110, 195;
2 Greenleaf, Evidence, §§ 101–136 *a*;
Foster's First Book of Practice, pp. 44–71;
Bolles, Important English Statutes, p. 178, *Hilary Rules*.

§ 314. Of the Pleadings to the Merits in Actions of Debt.

In an action of *debt upon a simple contract* the declaration must describe the circumstances from which the law implies the debt, or the express agreement which creates the obligation with its parties, subject-matter, and consideration; and must allege that the debt has not been paid, and is still due. In *debt upon a contract under seal* the declaration must contain a recital of the sealed instrument or a statement of its substance and legal effect, with an offer to produce it when it is within the plaintiff's control; and must set forth such further circumstances as are necessary to show that under the contract the money has become due to the plaintiff, and allege that it has not been paid by the defendant. To these two forms of debt the *general issue* is *nil debet*, covering all defences except tender, set-off, the Statute of Limitations, and estoppel; though where the debt has become due by the terms of the instrument itself the general issue may be *non est factum* which denies only the execution and validity of the instrument, leaving all other defences to be made by special plea.

Rem. In *debt on a judgment* or other record the declaration must recite the record or its substance; must allege the jurisdic-

tion of the court which rendered the judgment unless its jurisdiction is presumed by law; and must affirm that the debt created by the record is unpaid and is now due to the plaintiff. The general issue in this action is *nul tiel record*, which denies only the existence and validity of the record; all other defences must be presented in special pleas. In *debt upon a private statute* the declaration must set forth all the material provisions of the statute; must charge the defendant with the forbidden actions or omissions of which he has been guilty; and must aver that he has never paid the penalty. In *debt upon a public statute* the declaration must assert the guilt of the defendant and his non-payment of the penalty, without reciting the statute or its substance, of which the court will take judicial notice. The general issue in debt upon a statute is *nil debet* or *not guilty*. Under *nil debet* any defence may be offered except tender, the Statute of Limitations, estoppel, and a former recovery of the penalty by another plaintiff. Under *not guilty* the culpable violation of the statute by the defendant is alone in issue.

READ: Stephen on Pleading, §§ 146, 147;
Shipman on Pleading, §§ 111–117, 196–198, 227;
2 Greenleaf, Evidence, §§ 279–292;
Foster's First Book of Practice, pp. 144–152, 194–196.

§ 315. Of the Pleadings to the Merits in Actions of Covenant-Broken.

The declaration in an *action of covenant-broken* must set forth so much of the instrument as may be essential to the cause of action, either in its express words or according to its legal effect; must make *profert* of the instrument or explain its absence; must affirm that it was sealed and delivered; must allege the performance of conditions precedent; and must aver its breach by the defendant and the consequent damage to the plaintiff. The *general issue* is *non est factum*, which denies the existence and validity of the covenant, leaving all other defences to be made by special plea.

Rem. *Profert* is an allegation by a pleader that he has brought into court some instrument which is the foundation of his claim. It is a rule in common-law pleading that profert must be made of all deeds, wills, letters of administration, and other solemn documents on which the pleader bases his action or defence; or if the instrument is not in his possession that he shall state its absence and excuse the omission; and his failure to do this renders his pleading subject to demurrer. When *pro-*

fert is made, if the adverse party wishes to see the document or hear it read, he must *crave oyer*, and until this is granted he is not obliged to answer to the pleading. In modern practice it is customary to furnish the adverse party with a copy of the document.

READ: Andrews, American Law, § 761;
Stephen on Pleading, § 111;
Gould on Pleading, ch. viii;
Perry on Pleading, pp. 58–60, 185–189, 204, 426–431;
Shipman on Pleading, §§ 62, 63, 118–122, 199, 384, 385;
2 Greenleaf, Evidence, §§ 233–247;
Foster's First Book of Practice, pp. 136–143.

§ 316. Of the Pleadings to the Merits in Actions of Account.

In an *action of account* the declaration must describe the contract or relation out of which arises the duty to account; must allege the neglect or refusal to account and specify the damage thereby inflicted on the plaintiff; and must pray that the required account be ordered by the court. In this action there is no single *general issue*. The plea *ne unque recevoir* denies the contract or relation; that of *plene computavit* affirms that the account has been fully settled; that of a *release* asserts that the liability to account, which once existed, has been extinguished by agreement.

Rem. When an acount is ordered by the court all questions of fact or law which would arise out of the contract or relation are open to dispute, and may be presented in the taking of the account. But these questions are not there raised by formal pleadings, as if the accounting were an action. They appear rather in objections to the evidence offered by the respective parties, or to the allowance of the plaintiff's claims.

READ: 3 Bl. Com., p. 163;
Shipman on Pleading, §§ 123–126;
2 Greenleaf, Evidence, §§ 34–39.

§ 317. Of the Pleadings to the Merits in Actions of Trespass.

In an *action of trespass quare clausum fregit* the declaration must describe the land with such particularity that it can be identified; must set forth the plaintiff's title and possessory rights; and must allege that the defendant entered wrongfully with force and arms to the damage of the plaintiff. In an *action*

of trespass de bonis asportatis the declaration must so describe the asported goods by character, quantity, quality and value, that they can be identified; must aver the plaintiffs' title and right to their possession; must specify the wrongful acts of violence of which the defendant has been guilty with their injurious effect upon the property; and must allege the loss thereby occasioned to the plaintiff. In an *action of trespass vi et armis* for the invasion of personal rights no mention of those rights is necessary in the declaration, but the wrongful acts of the defendant and their consequences to the plaintiff must be particularly set forth. In an *action of trespass per quod* the declaration must describe the relation out of which the right to service grows; the forcible or fraudulent interference of the defendant with the person from whom the service was due; the consequent loss of service; and the damage to the plaintiff. The *general issue* in all forms of trespass is *not guilty*. This plea denies the personal, family, property or official rights set up in the declaration, and the alleged wrongful acts of the defendant. All other defences require a special plea.

Rem. Trespass *quare clausum* and trespass *de bonis*, being injuries to possession rather than ownership, do not require that the plaintiff in those actions should always allege and prove his title. But where he did not have actual possession, and stands upon a claim of constructive possession or a right of immediate possession, title may become important; since where there is no other possession the law imputes possession to the true owner of the property. In such cases, title should always be alleged and proved.

READ: Stephen on Pleading, § 149;
Shipman on Pleading, §§ 145–151, 201;
2 Greenleaf, Evidence, §§ 82–100, 612–635 *a*;
Foster's First Book of Practice, pp. 153–178.

§ 318. Of the Pleadings to the Merits in Actions of Trespass on the Case.

In *actions of trespass on the case* the declaration must describe in detail the circumstances which disclose the right of the plaintiff; the wrongful action or omission of the defendant and its relation to the plaintiff's right; and the injurious effect of such action or omission upon the plaintiff's person, property, or

family prerogatives. The *general issue* is *not guilty*, and according to the usual practice it embraces every defence except the Statute of Limitations, estoppel, and an attempt to justify a slander by establishing its truth.

Rem. As an action on the case was intended and devised in order to settle the controversy between the parties on just and equitable grounds, the greatest latitude is allowed in the pleadings and evidence. All the facts entering into the controversy up to the date of the trial may be brought to the attention of the court through the declaration and subsequent pleadings, and under the general issue all may be proved except the three above enumerated; and these three require special pleas only because it is optional with the defendant whether he will present or waive them, and if he chooses to present them justice requires him to give notice to the plaintiff so that he may be prepared to meet them.

READ: Stephen on Pleading, § 151;
Perry on Pleading, pp. 81, 82;
Shipman on Pleading, §§ 127–133, 203;
2 Greenleaf, Evidence, §§ 223–232 *b*;
Foster's First Book of Practice, pp. 72–113, 122–135.

§ 319. Of the Pleadings to the Merits in Actions of Trover.

The declaration in an *action of trover* must so describe the property that it can be identified; must assert the plaintiff's title and right of possession; must allege that the plaintiff lost the property out of his possession and that the defendant found it, and subsequently converted it to his own use or unconditionally refused to deliver it to the plaintiff on his demand; and must state the damage which the plaintiff has thereby sustained. The *general issue* in trover is *not guilty*, and it covers all defences except that of an adverse title to the property, a release of the cause of action, the Statute of Limitations, and estoppel.

Rem. When the conversion is a wrong not only against the possession but also against the ownership of the property, the plaintiff in the action of trover must claim, and be prepared to prove, a general or special title to the property, in addition to its actual or constructive possession, at the date of the alleged conversion. Then the action may be brought by an owner, or bailee, an agent or a finder, but not by a mere custodian or a servant.

READ: Perry on Pleading, p. 93;
Shipman on Pleading, §§ 139–144, 202;
2 Greenleaf, Evidence, §§ 636–649;
Foster's First Book of Practice, pp. 113–122.

§ 320. Of the Pleadings to the Merits in Actions of Replevin.

In an *action of replevin* the declaration must so describe the property that it can be identified; must set forth the plaintiff's rights of ownership and possession; must allege the unlawful taking or detention by the defendant or his refusal to deliver on demand; and must assert the resulting damage to the plaintiff. The *general issue* is *non cepit in modo et forma* or *non detinet.* It is employed only when the defendant does not claim the property. Under this pleading he may urge any defence except a want of title or possession in the plaintiff, a release or other avoidance of the cause of action, the Statute of Limitations, or estoppel.

Rem. If the defendant in replevin wishes to deny the plaintiff's title to the property he must set up an adverse title either in himself or on behalf of some one under whom he claims. When he desires a return of the property he must *plead in avowry* of his own right or the right of his wife, or *make cognizance* in the right of the third person whom he represents, and claim the restoration of the property to him. To these pleadings the plaintiff must make answer by a traverse, or confession and avoidance, or demurrer.

READ: 3 Bl. Com., pp. 146–151;
Stephen on Pleading, § 152;
Perry on Pleading, pp. 74–77, 343, 398;
Shipman on Pleading, §§ 152–157, 204;
2 Greenleaf, Evidence, §§ 560–570;
Maxwell on Pleading and Practice, §§ 926–933;
Foster's First Book of Practice, pp. 179–193.

§ 321. Of the Pleadings to the Merits in Actions of Detinue.

The declaration in an *action of detinue* must so describe the property that it can be identified; must allege the title of the plaintiff, and his right to its possession; must set forth its wrongful taking or detention by the defendant, or his refusal to deliver it on demand, with the consequent damage to the plaintiff; and must pray for its return to him as its true owner. The *general issue* in this action is *non detinet,* which denies the plain-

tiff's right to the property and its wrongful detention, leaving all other defences to be made by special plea.

Rem. As the primary purpose of this action is to restore the property itself to its lawful owner, no person should be made defendant except the one in whose possession or under whose control the property is at the time the suit is brought. Still, if the defendant once possessed the property, and in order to prevent the owner from recovering it has fraudulently put it out of his own hands before the suit is instituted, judgment for damages may be rendered against him although the property cannot be restored.

READ: Stephen on Pleading, § 148;
Shipman on Pleading, §§ 134–138, 200.

§ 322. Of the Pleadings to the Merits in Actions of Ejectment.

In *actions of ejectment* the declaration must describe the land by such boundaries or other characteristics that its limits can be clearly identified; must set forth the plaintiff's title and possessory rights; must allege the wrongful entry and present occupation of the land by the defendant; and must claim the restoration of the property to the plaintiff, with damages for the intrusion or *mesne profits* for the unlawful occupation. The *general issue* in ejectment is *nul disseisin*, which traverses the present title and possessory right of the plaintiff as well as the wrongful entry and occupation of the defendant, thus covering every defence available in this action except that of estoppel.

Rem. In the action of ejectment, unless extended in its scope by local statutes, only nominal damages can be recovered; and a separate action of *trespass for the mesne profits* must be brought if the plaintiff claims compensation for the use of the property during the unlawful occupation. This action resembles in its pleadings the action of trespass *quare clausum*, and in it damages may be awarded for injury to the property as well as for its use and enjoyment.

READ: Shipman on Pleading, §§ 158–165;
2 Greenleaf, Evidence, §§ 303–337, 547–559.

§ 323. Of the Pleadings to the Merits in Extraordinary and Auxiliary Actions.

The pleadings in *extraordinary and auxiliary actions* have no technical form, and no artificial significance. Their declara-

tions or petitions must contain a statement of facts sufficient to warrant the court in granting the desired relief, and must therefore vary with the circumstances of the individual case. They have no general issues or formal pleas in bar, — the answers of respondents raising such objections to the declarations, or presenting such new questions, as may be necessary to protect their rights. To these answers the petitioners reply by amending their own pleadings, or by additional statements as the progress of the case requires.

Rem. In all these actions local custom and rules of practice largely govern the procedure. This is particularly true of actions of *garnishment, scire facias,* and *writs of error,* each of which is interwoven more or less with other actions whose proceedings are often of a distinctly local character. Actions of mandamus, procedendo, prohibition, quo warranto, and habeas corpus conform more closely to a general standard.

READ: Maxwell on Pleading and Practice, §§ 400–473, 625–638, 745–831, 934, 972–974, 986–990;
Spelling on Injunctions, etc., §§ 1313–1361, 1623–1715, 1745–1764, 1834–1888;
Foster's First Book of Practice, pp. 245–272;
Bliss on Code Pleading, §§ 443–460.

§ 324. Of the Pleadings under the New Procedure: Code Pleading.

The confusion introduced into the system of common law pleading by the custom of joining different causes of action, and sometimes different forms of action, in one declaration; by the double pleading authorized by the Statute of Anne; by the extension of the general issue to cover defences logically presentable only under special pleas; and by the numerous discordant statutory modifications of the ancient rules by the legislatures of our American States, — has led in a great number of them to the substitution for the common law system of another system which has acquired the name of the "*New Procedure*" or "*Code Pleading.*" *Code Pleading* does not dispense with the common law actions as definite groups of rights, wrongs, and remedies; nor with the relations of causes of action to defences or of defences to pleadings; nor with the substantial allegations of declarations, demurrers, traverses, or special pleas; nor with

the rules which require all pleadings to be complete, accurate, definite, positive, and certain. The changes made pertain chiefly to *form*, and in brief are these: (1) All actions, both legal and equitable, are known by the same name, — the "*civil action*," and use the same form of commencing and concluding pleadings, and pray for whatever relief, legal or equitable, the violated rights of the plaintiff may demand; (2) All causes of action may be joined in one declaration, in different counts, (a) when they arise out of the same transaction, and are between the same parties in the same personal or official capacity; or (b) when they are all based on contracts, express or implied; or (c) where all arise from injuries to person or property; or (d) where all are attacks upon the reputation of the plaintiff; or (e) where all are claims to recover personal property *in specie;* or (f) where all are claims to recover land; or (g) where all relate to the liability of trustees in reference to trust property; (3) All pleadings are to be expressed in simple language, avoiding technical terms as far as possible; (4) The declaration, otherwise known as "*the complaint*," must contain the same substantive allegations, suited to set forth each cause of action, as at common law; (5) In place of the general issue and the special pleas in bar the defendant must present an "*answer*," traversing in plain terms such allegations of the complaint as he intends to deny, expressly admitting whatever he does not deny or else averring that he has not sufficient information to enable him to admit it or deny it and therefore puts the plaintiff on its proof, and setting up any new matter in avoidance of those allegations which he does not admit or deny; (6) All the defences to all the causes of action are to be included in one answer, though separately stated, and may be based on any equitable or legal ground; (7) Any matter of set-off, recoupment, or counter-claim may be advanced by the defendant in connection with his answer, but must be averred with the same certainty as in a declaration; (8) In any respect in which these pleadings may be insufficient in matter or form they may be amended, or new matter may be added, in order fully to present the controversy to the court; (9) To a denial by the defendant the plaintiff makes no reply, since the matter stands at once at issue, but to a confession and avoidance he demurs, traverses,

or confesses and avoids as at common law, and to a set-off he makes answer as if it were a declaration in a separate suit; (10) Every demurrer must specially point out the defects at which it is aimed, and all not so pointed out are waived or cured by verdict; (11) All defects of jurisdiction or process not apparent on the writ or the pleadings must be taken advantage of by an answer like a plea in abatement, or they will be waived.

Rem. With some unimportant variations this system of *Code Pleading* has now been adopted in more than half of our States and Territories, and will probably in time become the universal method of procedure. The evils which resulted in its introduction here were met in England by the Hilary Rules in A. D. 1834, restricting the scope of the general issue and regulating the use of counts and pleas; by the Rules of A. D. 1883, practically abolishing the general issue; and by other statutory and judicial enactments.

READ: Andrews, American Law, §§ 635–641, 650;
Maxwell on Code Pleading, pp. 1–19, 69–120, 360–407;
Foster's First Book of Practice, pp. 197–220;
Bliss on Code Pleading, §§ 135–319, 323–442.

§ 325. Of the Pleadings: the Final Issue: the Trial.

The pleadings of the parties always terminate either in a demurrer and joinder presenting an issue of law, or in a traverse and similiter creating an issue of fact. An *issue of law* is tried by the judge, usually upon the arguments or briefs of counsel. The trial of an *issue of fact* is, at common law, conducted before a jury, though in this country the practice of waiving a jury, and submitting the facts to the judge alone, is frequently adopted. Upon every trial that party who, under the pleadings, has the *affirmative* of the issue must go forward, — the demurrant in an issue of law, the last pleader before the final traverse in an issue of fact, — and upon him rests the *burden of sustaining* his demurrer by demonstrating its legal propositions, or his allegations of fact by a preponderance of evidence.

Rem. A *demurrer* to any pleading admits, for all the purposes of the demurrer, the facts alleged in that pleading; and hence these facts are not considered at the trial on the demurrer, except as they define and explain the issue of law. A *judgment*

of the court *sustaining the demurrer* either terminates the action in favor of the demurrant, or imposes on his adversary the duty of amending the defect. A *judgment overruling the demurrer* was once final on the merits, under the rule that a demurrer admitted the facts for all the purposes of the entire case; but it is now generally followed by an order to the demurrant to answer over, which he does by the general issue or a special plea.

READ: 3 Bl. Com., pp. 314–324;
Andrews, American Law, §§ 890, 891;
Stephen on Pleading, §§ 115–121;
Perry on Pleading, pp. 179–181, 191–193, 215–218, 234, 239, 240, 292–294;
Shipman on Pleading, §§ 65–69, 166, 170, 171, 175–186;
Maxwell on Pleading and Practice, §§ 284–290, 335–342;
Stephen on Evidence, §§ 93–97;
Thayer on Evidence, pp. 353–389;
Rice on Evidence, §§ 60–92;
Underhill on Evidence, §§ 247–254;
Wharton on Evidence, §§ 353–371;
Wood on Practice Evidence, §§ 197–206.

§ 326. Of the Trial: the Jury: Challenges: Order of Trial.

The *jury* in an action in the courts of common law is a body of twelve men, summoned from the county where the court is held, and duly sworn to try the issues of fact between the plaintiff and defendant, and to decide them according to the law and the evidence. The *process*, by which the sheriff is directed to summon into court the men who are to constitute the jury, is known as the *venire*, and must be served and returned in the manner provided by the local law. When the jurors appear in court, and before they are sworn to try the issue, the parties to the action have a right to make objection either to the whole body of jurors, or to any individual among them, by a *challenge*. An objection to the whole body of jurors is called a *challenge to the array*, and may be based on a defect in the *venire* or its mode of service, or on some partiality of the sheriff by whom it was served. An objection to individual jurors is called a *challenge to the polls*, and rests on some legal disqualification of the juror, or his probable bias in favor of one of the parties. When a challenge to the polls is sustained by the court the juror is discharged from service in that suit, and another juror is substituted in his place. When a challenge to the array is sustained

a new *venire* is issued and served. Besides these *challenges for cause* each party is allowed, in some States, a certain number of *peremptory challenges*, for which no reason need be assigned. A sufficient number of duly qualified jurors having been obtained the official oath is administered to them, and the trial then begins.

Rem. Local custom enters largely into the conduct of proceedings in a jury trial, especially in reference to their order. Generally, they open with the reading of the pleadings by the respective counsel, followed by a statement of the counsel for the affirmative explaining his claims, and briefly outlining the evidence by which he expects to substantiate them. His testimony is then introduced, and when it is completed the adverse counsel makes a statement of his claims and his prospective evidence; refuting at the same time, so far as he is able, the claims and proof of his antagonist. His evidence being offered, and being met by such rebutting testimony as the affirmative can present, the counsel for the affirmative closes the case with an argument in support of his side of the issue. The judge then instructs the jury as to the nature of the cause, defines the issues, points out the rules of law which govern their decision, and commits the case to their deliberations. After due consideration the jury return their verdict, and if it is accepted by the judge it forms the basis of his judgment, with the announcement of which the trial ends. One of the most important steps in these proceedings is the *opening statement* of the counsel for the affirmative. On it the jury depend for their ability to comprehend the issues and apply to them the future testimony, and consequently it should never be omitted. To serve its purpose it must be (1) *truthful*, or such as the evidence about to be offered will sustain; (2) *probable*, or such as the jury will accept for the time being as likely to be correct; (3) *favorable* to the claims of the counsel making it; (4) *clear* to the understanding of the jury; (5) *brief*, confining itself to the sufficient explanation of material facts; and (6) *pleasing* to the jury in its manner of delivery. Such a statement goes far toward the eventual success of the party offering it, because the impressions made by it are *first impressions*, which are rarely eradicated by any subsequent discoveries or convictions.

READ: 3 Bl. Com., pp. 349–366;
Andrews, American Law, §§ 768–777;
Maxwell on Pleading and Practice, §§ 160–188;
Foster's First Book of Practice, pp. 383–387;
Robinson, Forensic Oratory, §§ 57–59, 313–320.

§ 327. Of the Trial: the Evidence.

Evidence is the means by which the existence or non-existence of alleged facts is ascertained. It is of three kinds: (1) Actual observation; (2) The testimony of persons whose knowledge of the facts has been derived from actual observation; (3) Logical inferences from facts which have been actually observed or are established by proper testimony. The first and second are different forms of "*direct evidence*"; the third is known as "*indirect, inferential,* or *circumstantial evidence.*"

Rem. Evidence of all these kinds is employed by courts in their judicial investigations; not, however, with the same latitude as by people at large in reference to general affairs. The peculiar character of a jury trial with its well-defined issues, and the necessity for expedition in the disposal of cases, have led to the adoption of legal rules which sometimes exclude much that on ordinary questions would deserve attention; sometimes enlarge the effect of testimony by giving it an artificial significance; and sometimes supply its place by presumptions. These rules often appear intricate and unreasonable to those by whom their purpose is not understood.

READ: 3 Bl. Com., pp. 366–375;
Andrews, American Law, §§ 779, 867–871, 875, 876;
Stephen on Evidence, Introduction;
Starkie on Evidence, pp. 15–21;
1 Greenleaf on Evidence, §§ 1–3, 7–13 *a*;
Thayer on Evidence, pp. 263–276, 508–538;
McKelvey on Evidence, §§ 1–10;
Jones on Evidence, §§ 1–8;
Bradner on Evidence, ch. i;
Rice on Evidence, §§ 317–319;
Underhill on Evidence, §§ 1–6;
Wharton on Evidence, §§ 1–9;
Wigmore on Evidence, §§ 1–3, 38–43.

§ 328. Of the Trial: the Evidence: Material Evidence: Relevant Evidence.

The *first rule,* distinguishing legal evidence from ordinary evidence, provides that it must be confined to the *substance of the issue.* The issue resulting from the pleadings embodies the decisive points in the controversy, and consists in the affirmation and denial of certain essential and specific facts which are therefore known as *material facts.* Direct evidence by observation, or by the testimony of actual observers, in support or

contradiction of these essential facts is called *material evidence*. Indirect evidence, or evidence of non-material facts from which an inference might be logically drawn in favor of or against material facts, is called *relevant evidence*.

Rem. Whether or not proposed evidence is *material* is seldom open to dispute, and when disputed is determined by comparing the fact offered to be proved with the facts alleged and traversed by the pleadings. Whether or not evidence is *relevant* is a far more difficult and frequently recurring question, and is decided by ascertaining: *first*, whether the fact to be established by the evidence is so related to the material facts as to have any inferential value whatever in their support or contradiction; and *second*, whether its inferential value is great enough to warrant its submission to the jury. All material evidence is *ipso facto* admissible on the trial of the case. Whether alleged relevant evidence is admissible is a question partly of logic, partly of experience, partly of conjecture, which must be settled by the judge when the evidence is offered. Mistakes in his rulings, if properly excepted to, are reviewable on a writ of error.

READ: Andrews, American Law, §§ 872, 877–884;
Stephen on Evidence, §§ 1–13;
Starkie on Evidence, pp. 67–81, 616–618, 839–869;
1 Greenleaf on Evidence, §§ 14–14 *v*;
McKelvey on Evidence, §§ 90–120;
Reynolds on Evidence, §§ 1–16;
Jones on Evidence, §§ 135–175 *a*, 232–234;
Bradner on Evidence, chaps. ii, iii, §§ 1, 2;
Rice on Evidence, §§ 1–15, 251–261;
Underhill on Evidence, §§ 7–24;
Wharton on Evidence, §§ 20–57;
Wigmore on Evidence, §§ 9–36;
Burrill on Circumstantial Evidence, pp. 1–247, 727–739;
Wills on Circumstantial Evidence, chaps. i–viii;
Gillett on Indirect and Collateral Evidence, §§ 51–97.

§ 329. Of the Trial: the Evidence: Confidential Communications.

A *second rule* distinguishing legal evidence from ordinary evidence is that which forbids courts, from motives of public policy, to receive judicial information through certain channels. Thus *public officers* are not allowed to testify to any secret affairs of state, or to any matters which the public interest requires to be concealed. *Counsel* are not permitted to testify to any facts confided to them by their clients, nor can a *client* be compelled

to disclose any communication passing between himself and his attorney. *Husband and wife* cannot give evidence in court against each other except in actions where some personal injury, inflicted by one upon the other, is the subject of controversy. Oral evidence of *transactions with deceased persons*, in support of claims against their estates, is generally prohibited unless antagonistic witnesses on their behalf appear. No witness is obliged to disclose facts which would *expose him to prosecution* for a criminal offence, or to any public penalty or forfeiture.

Rem. At common law disclosures made to physicians and spiritual advisers in the course of their professional duties were not regarded as confidential and protected. The statutes of many of our States, however, place them in the same class as those made to public officers and attorneys; and where there are no such statutes the courts are reluctant to require their revelation.

READ: Andrews, American Law, §§ 873, 894;
Starkie on Evidence, pp. 39–42;
1 Greenleaf on Evidence, §§ 236–254 *c*, 334–346;
McKelvey on Evidence, §§ 208–228;
Reynolds on Evidence, §§ 80–95;
Jones on Evidence, §§ 733–762;
Bradner on Evidence, ch. iv;
Rice on Evidence, §§ 289–291;
Underhill on Evidence, §§ 165–178;
Wharton on Evidence, §§ 576–608;
Wigmore on Evidence, §§ 2285–2396;
Rapalje on Witnesses, §§ 270–278;
Hageman on Privileged Communications, §§ 1–324;
Maxwell on Pleading and Practice, §§ 202–209.

§ 330. Of the Trial: the Evidence: Hearsay Evidence.

The *third rule* distinguishing legal evidence from ordinary evidence is that which compels the courts to reject hearsay evidence. *Hearsay evidence* is the evidence offered by a witness whose testimony consists of a narration of what other persons have communicated to him concerning the material or relevant facts. The witness in this case does not state any material or relevant fact as being known to him by actual observation, but merely repeats the information given to him by others. His evidence is, therefore, *second hand*, and though in ordinary life it would be received as of some value the courts exclude

it: *first*, because of its inherent unreliability; and *second*, because the statement of third persons which the witness now repeats was not originally made in open court and under oath, and subject to cross-examination by the party against whom it is now offered.

Rem. Hearsay evidence must not be confounded with testimony concerning statements made by third persons when *the fact that such statements were made* is, in itself, a material or relevant fact. Of such statements there are *ten well-recognized classes:* (1) *Admissions*, or *declarations against interest* made by a party-litigant, or by his agent, or by some person in whose right he claims; (2) *Confessions*, or acknowledgments by accused or suspected persons, tending to show their guilt; (3) *Dying declarations*, or statements made under apprehension of immediate death, by a person alleged to have been killed by another, describing the method and the perpetrator of the homicide; (4) *Statements made by a person since dead, insane, or beyond the reach of process*, while testifying under oath in the same action, or in another action involving the same issues between the same parties or their representatives in interest; (5) *Statements made by persons since deceased or insane, or now beyond the reach of a subpœna*, in the ordinary *course of business*, or in the discharge of some *professional duty*, or in reference to the existence of some *public right or custom*, while as yet no dispute concerning such right or custom had arisen: (6) *Statements made by persons since deceased or insane, or now beyond the jurisdiction of the court*, concerning *pedigree, relationship, births, deaths*, or *marriages*, where the person making the statement was a *blood relation* of the individual to whom the statement referred or was the wife or husband of such blood relation, and where the statement was made before the facts themselves became the subject of controversy; (7) *Statements made by a testator since deceased* concerning the contents of his will, when the will, though proved to have once existed, cannot now be found; (8) *Statements made by a witness*, when testifying at a former stage of the same action, who has now given evidence inconsistent therewith; (9) *Statements accompanying an act or condition* which has already been the subject of testimony in the same action, and which tends to explain such act or condition; (10) *Statements which form an essential part of the transaction* out of which the cause of action or the defence has arisen, and hence are included among the *res gestæ*. In every one of these ten classes of statements the fact that the statement was made by the person who made it tends to prove the fact stated, and hence the statement is not second hand or hearsay

evidence, nor does it resemble hearsay except that it is communicated to the court by witnesses who heard it. A similar, but not the same, distinction must be made between hearsay evidence and evidence concerning statements made by a witness out of court at variance with his testimony in court, for the purpose of contradicting him or of impeaching his veracity. The rules governing all these statements apply equally to cases where the statements were made by signs or in writing, as by entries in account books, or in family or public records, or by inscriptions upon tombstones, or in private letters, or in articles in the public press.

READ: Andrews, American Law, § 885;
Stephen on Evidence, §§ 14–35, 55–57;
Starkie on Evidence, pp. 43–66, 81–96;
1 Greenleaf on Evidence, §§ 98–235;
McKelvey on Evidence, §§ 58–89, 138–198 c;
Reynolds on Evidence, §§ 16–49;
Jones on Evidence, §§ 235–358;
Bradner on Evidence, chaps. vii, xii–xiv;
Rice on Evidence, §§ 211–250;
Underhill on Evidence, §§ 50–124;
Wharton on Evidence, §§ 170–270, 1075–1220;
Wigmore on Evidence, §§ 1360–1810;
Wood on Practice Evidence, §§ 83–187;
Gillett on Indirect and Collateral Evidence, §§ 1–50, 98–206, 223–299.

§ 331. Of the Trial: the Evidence: the Best Evidence.

A *fourth rule* distinguishing legal evidence from ordinary evidence is that which requires the party offering testimony to produce the *best evidence* within his power. This rule obliges him, in offering *written evidence*, to present the *original documents;* or to prove that they once existed and have been destroyed; or that they are in the possession of the adverse party; or that he has used due diligence in searching for them in the places where they should be found and has searched in vain. If the originals cannot be produced duplicates, having the same legal effect upon the rights of the parties as the originals, may be offered. If these are wanting properly identified *copies* stand next in order; then *written memoranda*, representing the substance of the document as the parties agreed that it should be made; and finally, as a last resort, *oral evidence* of its execution and contents. The original document itself is known as *primary evidence;* the other modes of proof are *secondary evidence.*

Secondary evidence may, in some cases, be of as high probative value as the primary could be, but this does not entitle it to admission if the primary can be obtained.

Rem. This rule, as a rule excluding evidence, applies only to written documents; but as a rule affecting the value and credibility of evidence it is always recognized whenever a party rests his case on testimony evidently inferior in certainty or reliability to that which, if his claims be true, he might have introduced.

READ: Andrews, American Law, §§ 886, 887;
Starkie on Evidence, pp. 641–646;
1 Greenleaf on Evidence, §§ 82–97 *d*;
Thayer on Evidence, pp. 484–507;
McKelvey on Evidence, §§ 252–256;
Reynolds on Evidence, § 54;
Jones on Evidence, §§ 176–231;
Bradner on Evidence, ch. viii, §§ 1–9, 21–31;
Rice on Evidence, §§ 93–124;
Underhill on Evidence, §§ 30–39;
Wigmore on Evidence, §§ 1171–1175;
Wood on Practice Evidence, §§ 1–13.

§ 332. Of the Trial: the Evidence; Fictions and Presumptions.

The *fifth rule* distinguishing legal evidence from ordinary evidence is that which recognizes legal fictions and presumptions as substitutes for actual evidence. A *legal fiction* is a conclusion of law, necessitated by justice but contrary to truth though in its nature possible, which is adopted by the law either because the actual condition of the facts places them beyond the reach of law, or because the law if applied to their actual condition would inevitably work a wrong. These fictions are binding on the courts in all cases where they do not lead to a perversion rather than a furtherance of justice. *Presumptions* are conclusions as to the existence or non-existence of disputed facts, derived from the consideration of facts already known. They are of two classes: (1) Presumptions of fact; and (2) Presumptions of law. A *presumption of fact* is a conclusion of fact reached by logical inference from certain known facts as accepted premises, and is identical with inferential or circumstantial evidence. Such a presumption is of the same probative force in legal as in ordinary evidence. It binds a court or jury only in the same way and to the same extent as any other logical infer-

ence, and may be ignored where the premises are doubtful or the inference is weak. A *presumption of law* is a conclusion adopted arbitrarily by the law as its chosen interpretation of established facts. Such a presumption has no place in ordinary evidence, and cannot be disregarded by the court or jury without such error as may invalidate the future judgment. Some presumptions of law are *irrebuttable,* and whenever the facts to which the law attaches them are proved the conclusion stands in place of all other evidence upon the point to which the presumption relates, and cannot be contradicted. Other presumptions of law may be rebutted by evidence, proving the contrary of the conclusion which the law draws from the facts. It is the tendency of modern rules to permit the rebuttal of all legal presumptions, and thus render them inoperative when contrary to demonstrable truth.

Rem. Legal fictions usually affirm the existence of that which does not exist, as for example that a husband and wife are one person; or deny the existence of that which does exist, as for example that a disseisee who has regained the seisin was ever deprived of it. They are comparatively few. Presumptions, on the other hand, are very numerous. Those most frequently encountered in the courts are: (1) Presumptions against ignorance and wrong; (2) Presumptions that persons who have rights assert them; (3) Presumptions that the course of nature is followed; (4) Presumptions that the usages of business and society are observed; (5) Presumptions that once existing states of fact continue according to their natural duration; (6) Presumptions as to the rights, duties, and liabilities of persons; (7) Presumptions as to time.

READ: Rob. Am. Jur., §§ 365–387;
Andrews, American Law, § 892;
Stephen on Evidence, §§ 98–105;
Starkie on Evidence, pp. 741–764;
1 Greenleaf on Evidence, §§ 14 *w*–81 *d*;
Thayer on Evidence, pp. 313–352;
McKelvey on Evidence, §§ 33–57;
Jones on Evidence, §§ 9–104;
Bradner on Evidence, chaps. xvi–xviii;
Rice on Evidence, §§ 28–59;
Underhill on Evidence, §§ 205–223;
Wharton on Evidence, §§ 1226–1365;
Wigmore on Evidence, §§ 2483–2539;
Wood on Practice Evidence, §§ 53–82;
Lawson on Presumptive Evidence, pp. 5–674.

§ 333. Of the Trial: the Evidence: the Relation of Oral Evidence to Written Instruments.

The *sixth rule* distinguishing legal evidence from ordinary evidence is that which forbids the parties to a written instrument to contradict its language, or to vary the interpretation which the law puts upon its terms, by offering in court any oral testimony which is inconsistent with it. This rule rests on the presumption that the parties, having deliberately chosen the language of the instrument to express their obligations, with a full knowledge of the interpretation which the law would attach to their words, must at that time have intended to be bound by that language as thus legally interpreted; and therefore cannot now be permitted to aver that they had a different intention which controlled their conduct.

Rem. This rule, although imperative within its proper sphere, covers a very narrow field. It does not prevent any persons, except the parties to the instrument and their privies, from contradicting either its words or meaning. It does not forbid even the parties to prove that there were collateral or subsequent agreements; or the existence of qualifying circumstances attending the execution of the instrument in question; or its invalidity for illegality, incapacity, or fraud; or to identify by oral evidence the subject-matter of the instrument or otherwise explain its ambiguities; or to show that the instrument was but one part of a larger transaction, in the light of whose entire facts the instrument must be construed.

READ: Stephen on Evidence, §§ 90–92;
Starkie on Evidence, pp. 648–735;
1 Greenleaf on Evidence, §§ 275–305 *m*;
Thayer on Evidence, pp. 390–483;
McKelvey on Evidence, §§ 274–282;
Reynolds on Evidence, §§ 69–72;
Jones on Evidence, §§ 412–499;
Bradner on Evidence, chaps. ix, x;
Rice on Evidence, §§ 156–188;
Wharton on Evidence, §§ 850–1071;
Wigmore on Evidence, §§ 2400–2478;
Wood on Practice Evidence, §§ 14–52;
Browne on Parol Evidence, §§ 1–28.

§ 334. Of the Trial: the Production of the Evidence: Facts Judicially Noticed.

The facts which a jury are permitted to consider under the six foregoing rules may be brought to their attention in four

methods: (1) By judicial notice; (2) By personal observation; (3) By documentary evidence; (4) By the testimony of witnesses. Many facts available in evidence in every trial are presumed by law to be already within the knowledge of the court and jury, and hence require no proof. Of these facts *courts are said to take judicial notice.* In these are included: *first,* all undisputed material facts alleged in the pleadings, with such other facts as they necessarily imply; and *second,* all those facts which are, or are supposed to be, part of the common stock of popular knowledge. All matters within these two classes the court and jury must consider as already before them, and may refresh their recollection concerning them by reference to any adequate and accessible authorities. But neither the judge nor the jury can consider a private fact of which they have a merely *personal* knowledge, however important may be its bearing on the issue, unless it has been brought to their attention by evidence properly produced in open court.

Rem. The "*common stock of popular knowledge*" embraces the following facts: (1) *Political facts,* such as the existence of other nations, their flags and seals, the law of nations, the territorial divisions and civil constitution of the State, the public matters which affect the State, its elections and general legislative meetings, its weights and measures, its coins and other circulating medium, and its public and special fasts and festivals; (2) *Legal facts,* such as the public laws of the State, its various courts with their jurisdiction and rules of practice, their officers and seals, the names and persons of their judges, their general customs of trade, and other matters of law and usage which are generally known to all the citizens; (3) *Official facts,* such as the names and functions of the President, Vice-President, senators, representatives, ambassadors, marshals, sheriffs, and all who hold office in the State by virtue of public election or appointment, the signatures of the President, marshals, and sheriffs, and the seals of notaries; (4) *Public history,* embracing the facts which constitute the political, social, and topographical development of the State, and which are generally accepted as true; (5) *Scientific facts,* comprising those facts in nature which are permanent and uniform and do not require special investigation to discover them, — such as the number of days in a given month, the succession of the seasons, the coincidence of days of the week with certain days of the month and year, the qualities of common substances, the processes of well-known arts, the

instincts, passions, and physical characteristics of ordinary human beings, and the natural consequences of familiar acts; (6) The *vernacular language*, or the meaning of all customary English words, and of such terms of art as are in common use.

READ: Andrews, American Law, § 888;
Stephen on Evidence, §§ 58–60;
Starkie on Evidence, pp. 735–741;
1 Greenleaf on Evidence, §§ 3 *a*–6 *e*;
Thayer on Evidence, pp. 277–312;
McKelvey on Evidence, §§ 11–23;
Reynolds on Evidence, § 56;
Jones on Evidence, §§ 105–134;
Bradner on Evidence, ch. vi;
Rice on Evidence, §§ 16–27;
Underhill on Evidence, §§ 236–244;
Wharton on Evidence, §§ 276–340;
Wigmore on Evidence, §§ 2565–2596;
Wood on Practice Evidence, §§ 188–196.

§ 335. Of the Trial: the Production of the Evidence: Inspection of Objects.

In the trial of an action that form of direct evidence which consists in the actual observation of persons, places, and objects may be employed whenever it is practicable. With the consent of the parties and the court the jury may be taken to view localities, examine landmarks, or inspect articles which for any reason cannot be produced in court. Persons and portable objects may be brought into the court-room and be subjected to immediate scrutiny; and where the originals are wanting models, photographs, maps, or diagrams, duly identified, may be used for the same purpose. Transactions which were material to the controversy may be reproduced by imitation before the jury, in order to illustrate the testimony and enable them to understand it and apply it; and other tests and experiments may be made in their presence whenever, in the judgment of the court, their comprehension of the case would be thereby increased.

Rem. The extent to which evidence of this species can be produced in any cause is largely within the discretion of the judge, and unless his ruling on the question works manifest injustice to the party it is no ground of error. A wide latitude in this direction is now generally permitted where it would not unreasonably protract the trial, or confuse the minds of the jury with needless details.

READ: Andrews, American Law, § 889;
1 Greenleaf on Evidence, § 13 *a*;
Reynolds on Evidence, §§ 115 *a*–115 **c**;
Jones on Evidence, §§ 393–411;
Underhill on Evidence, § 39;
Wharton on Evidence, §§ 345, 346;
Wigmore on Evidence, §§ 1150–1168;
Harris on Identification, §§ 157–178, 573–612;
Maxwell on Pleading and Practice, §§ 281, 282.

§ 336. Of the Trial: the Production of the Evidence: Documentary Evidence.

When the issue involves the existence or the contents of a written instrument, the instrument itself must be produced in court either *in specie*, or through that secondary evidence which may be employed when primary evidence cannot be obtained. An *instrument or document* is any substance upon which are inscribed or otherwise expressed any marks or signs capable of being read. Documents are either public or private. A *public document* is one which a public officer is obliged by law to keep and preserve; and these may be judicial or ministerial, of record or not of record. Public documents import verity, and are *prima facie* proof of the facts which are entered on them by the proper officer in the fulfilment of his legal duty. When the law permits them to be taken into court they may be submitted to the inspection of the jury, and where this is impossible copies may be offered in their stead. *Copies of public documents* are of various kinds: (1) *Exemplifications*, which are copies authenticated by the seal of the State or of the court; (2) *Examined and sworn copies*, which are made by private copyists who compare them with the originals and swear to their identity in the presence of the jury; (3) *Office copies*, which are made by the officer who is in charge of the originals and is empowered by law to give authoritative copies; (4) *Certified copies*, which may be prepared by any copyist but are certified to be correct by the official custodian of the document. Exemplifications prove their own official character and authenticity, since the courts take judicial notice of the official seal which gives them a sufficient sanction; but other copies must be authenticated in the mode prescribed by the statutes of the State in whose courts they are to be offered. In this country exemplified

or certified copies are usually employed. A *private document* is one made by or between private parties, or by a public officer of his own volition and without the express or implied commandment of the law. When private documents are introduced as evidence their execution must be duly proved according to the requirements of the law; and if the originals are not obtainable the duplicates or copies, which may then be offered, must be shown to be correct by other testimony. Unlike the statements in a public document, those in a private document do not import verity. The existence, contents, and legal efficacy of the document itself are established by its production and its interpretation by the court; but except so far as its recitals work an estoppel, or operate as admissions or declarations made by the parties to the document, they have no further evidential value.

Rem. Where the execution of a private document is disputed the *handwriting* of the alleged signers and witnesses may be proved by the testimony of persons who have seen them write, or are otherwise acquainted with their signatures; or by comparing the document with known specimens of their handwriting, in reference to which the evidence of experts is admissible. *Ancient deeds*, and other instruments exceeding thirty years of age, are presumed to have been executed by their apparent signers, since the lapse of a generation may extinguish all possible means of identifying their handwriting. The *genuineness* of other private memoranda may be established in a similar manner, and then if relevant to the issue they may be admitted in evidence.

READ: Stephen on Evidence, §§ 36–47, 61–89;
Starkie on Evidence, pp. 255–583;
1 Greenleaf on Evidence, §§ 470–581 *a*;
McKelvey on Evidence, §§ 257–273;
Reynolds on Evidence, §§ 59–68, 109–115;
Jones on Evidence, §§ 500–633;
Bradner on Evidence, ch. viii, §§ 10–36;
Rice on Evidence, §§ 125–155;
Underhill on Evidence, §§ 125–160;
Wharton on Evidence, §§ 60–163, 614–841;
Wigmore on Evidence, §§ 1177–1354, 2129–2169;
Wood on Practice Evidence, §§ 207–249;
Harris on Identification, §§ 288–479;
Lawson on Expert and Opinion Evidence, pp. 327–444;
Maxwell on Pleading and Practice, §§ 79–86.

§ 337. Of the Trial: the Production of the Evidence: Testimony of Witnesses: Competency of Witnesses.

A *witness* is a person who is duly sworn and examined, during a judicial investigation, in reference to matters at issue in the cause. Any sane person who understands and recognizes the obligations of an oath, unless he is disqualified by positive law, is a *competent witness*. Formerly all those who had been convicted of certain infamous crimes such as forgery or perjury, and all those who were interested in the merits of the controversy, were treated as incompetent; but such persons are now generally allowed to testify, and their interest or infamy is regarded only in its effect upon their credibility. Any competent person may be utilized as a witness if he can testify from his actual observation as to the existence or non-existence of any material or relevant fact embraced in the issue, unless he occupies toward the State, or one of the parties to the cause, some relation in view of which the law, from motives of public policy, forbids him to disclose the facts within his knowledge.

Rem. Although a witness is usually employed to testify to facts which become known to him by actual observation and experience yet there are some occasions when he is allowed to state the *impression* made upon his mind by the facts as they occurred. Various matters of fact, such as quantity, size, duration, speed, value, danger, health, damage and the like are so commingled, in the mind and language of the witness, with matters of inference derived therefrom that evidence of the precise facts observed could rarely be obtained, or any evidence at all concerning them could be presented to the court, unless the witness were permitted to state them in the form of his impressions or opinions, whose value can be tested by examining the circumstances on which they were based. Hence, where the witness has observed the facts, and is capable of perceiving what they indicate, his opinion is received and submitted to the jury; leaving them to determine how far it is well founded, and to accept it or modify it or reject it according to their own judgment. Such a witness is not an *expert*, though often erroneously called such, but a common witness giving his testimony in a form well known to ordinary evidence; and admitted by the courts because of its necessity and general reliability. An *expert witness* is a person who, by his training and experience in some art or science, is better qualified to perceive, understand, and explain certain matters of fact than other men

are. Such a witness may not only state what he has observed and what it signifies, but may give an opinion based on matters not within his personal knowledge when communicated to him by others, or on hypothetical conditions submitted to him in open court. His opinion in such cases, though it may be scientifically correct and of the highest value, is not binding on the jury but may be weighed by them and set aside if not agreeing with their own. Before an expert can be allowed to testify in that capacity his qualifications must be examined, and be adjudged sufficient by the court.

READ: Andrews, American Law, §§ 889 *a*, 893;
Stephen on Evidence, §§ 48–54, 106–122;
Starkie on Evidence, pp. 21–39, 102–145;
1 Greenleaf on Evidence, §§ 306–430 *q*, 441 *b*–441 *l*;
McKelvey on Evidence, §§ 121–137, 199–207;
Reynolds on Evidence, §§ 50–53, 78, 79;
Jones on Evidence, §§ 359–392, 712–796;
Bradner on Evidence, chs. v, xv;
Rice on Evidence, §§ 189–210, 262–273;
Underhill on Evidence, §§ 185–202, 275–324;
Wharton on Evidence, §§ 376–490;
Wigmore on Evidence, §§ 483–764, 1813–1862. 1917–2027;
Rapalje on Witnesses, §§ 1–179, 286–307;
Rogers on Expert Testimony, §§ 1–207;
Lawson on Expert and Opinion Evidence, pp. 1–616;
Gillett on Indirect and Collateral Evidence, §§ 207–223;
Harris on Identification, §§ 179–231;
Maxwell on Pleading and Practice, §§ 189–201, 210–216.

§ 338. Of the Trial: the Production of the Evidence: Testimony of Witnesses: the Examination of Witnesses in Court.

The *examination of a witness in court* is divided into three stages: (1) The direct examination by the party on whose behalf he is called; (2) The cross-examination by the adverse party; (3) The redirect examination. On the *direct examination* he can be questioned only upon material or relevant facts, or matters necessary to their explanation. No *leading questions*, or questions which directly suggest to him the answer he is desired to give, can be propounded to him unless he shows himself to be hostile to the party examining him, and can in no other manner be compelled to disclose the truth; nor can he be asked a question which *assumes the existence* of a material or relevant fact that has not been already admitted or established. On this examination the witness may *refresh his memory* by reference to writings or other data, provided that he can thereafter testify to

the facts from his own recollection. On the *cross-examination* a far wider latitude is allowed. Leading questions may be asked, collateral facts elicited, and inquiries made concerning any matter which, in the opinion of the judge, would serve to test the veracity and knowledge of the witness. A witness cannot, however, be cross-examined as to any immaterial or irrelevant fact merely for the purpose of contradicting him thereafter by other evidence, and thereby showing that in this particular instance he has been mistaken. The *redirect examination* is intended to enable the witness to explain, if necessary, the statements which he has made upon the cross-examination, and properly should be confined thereto, though a much larger range is often allowed in modern practice.

Rem. The process by which witnesses are summoned to appear and testify is a *subpœna*, followed when necessary by a *capias* to secure their attendance. Where written instruments, in the possession of a third person, are required as evidence such person may be summoned to appear and produce them by a *subpœna duces tecum*. If such instruments are in the possession of the adverse party notice may be served upon him to bring them into court, and if he fails to do so secondary evidence of their existence and contents may be given.

READ: Andrews, American Law, §§ 895, 896;
Stephen on Evidence, §§ 123–140;
Starkie on Evidence, pp. 146–254;
1 Greenleaf on Evidence, §§ 431–469 *n*;
McKelvey on Evidence, §§ 229–251;
Reynolds on Evidence, §§ 73–77, 96–108, 116–130;
Jones on Evidence, §§ 797–903;
Bradner on Evidence, ch. xx;
Rice on Evidence, §§ 274–284, 314–316;
Underhill on Evidence, §§ 330–346, 366–386;
Wharton on Evidence, §§ 491–548, 572–575;
Wigmore on Evidence, §§ 766–812, 1863–1910, 2030–2125, 2175–2282;
Rapalje on Witnesses, §§ 229–285;
Maxwell on Pleading and Practice, §§ 136, 137, 214, 217–256, 265–278, 283.

§ 339. Of the Trial: the Production of the Evidence: Testimony of Witnesses: Depositions.

Where a witness, through infirmity of body, or on account of his remoteness or his absence from the jurisdiction, cannot be compelled to present himself in court to testify, his evidence may

be taken in writing by a magistrate, or by some other person duly authorized thereto by the mandate of the court or the agreement of the parties, and be submitted to the jury at the trial of the case. Testimony thus taken is called a *deposition*. It is not documentary evidence although it is in writing, but is merely a convenient method of presenting to the court the statements of a witness who is otherwise inaccessible. A deposition can be taken only after due *notice given* to the adverse party in the manner required by the local law, and must be conducted by examining the witness under oath as if the testimony were being given by him in open court. The parties may be represented by their counsel who propound the questions *viva voce*, or written interrogatories and cross-interrogatories may be prepared beforehand, and forwarded to the magistrate who conducts the examination, and reduces the evidence to writing. The deposition when completed is generally read to the witness, and if correct is signed by him; and is then certified and sealed up by the magistrate, and returned to the court. If the reason for taking the deposition ceases before the trial, and the witness is then able to be present, he must be summoned to appear and testify, and the deposition will not be admissible.

Rem. The power to obtain the testimony of absent witnesses, by means of depositions, is not confined to any jurisdiction. In the same State where the witness resides, and in any other State in the civilized world, this privilege may be enjoyed, through the agency of local judicial or administrative officers, as a right recognized by the comity of nations, and necessary to the enforcement of public as well as private law.

READ: 1 Greenleaf on Evidence, §§ 163 *b*, 163 *c*, 163 *h*, 320–325, 516, 517, 552;
Jones on Evidence, §§ 634–711;
Rice on Evidence, §§ 297–301;
Underhill on Evidence, §§ 355–364;
Maxwell on Pleading and Practice, §§ 101–135;
Foster's First Book of Practice, pp. 406–412.

§ 340. Of the Trial: the Production of the Evidence: Testimony of Witnesses: Contradiction and Impeachment of Witnesses.

One purpose of the cross-examination of a witness is to show that he is unreliable, either because he cannot accurately re-

member and describe the facts concerning which he testifies, or because he voluntarily or carelessly states what he knows to be untrue. This also is the purpose of his contradiction or impeachment. The *contradiction of a witness* consists: (1) In proving by other witnesses that material parts of his testimony are false; (2) In showing that he has himself on other occasions made assertions contrary thereto. The former contradiction attacks the ability or integrity of the witness, and may be made as part of the general evidence in the case. The latter contradiction attacks his veracity, and must be specially offered after a foundation has been laid for it by asking him, on his own examination, whether he has not made the inconsistent statements. The *impeachment of a witness* consists in proving, by independent testimony, that according to the current opinion of the community in which he lives his truthfulness is not up to the standard of that of men in general. Evidence to this effect may be given in court by any persons familiar with his reputation for veracity.

Rem. The questions raised by the attempts to contradict and to impeach a witness are not precisely identical. The first endeavors to show that in reference to the testimony already given by him he has intentionally or unintentionally stated an untruth. The second is an effort to prove that by his habitual open falsehoods he has acquired such a reputation that no one can safely rely upon his word; and is a far more serious attack upon his character than his mere contradiction. It is also seldom resorted to because more difficult to prove, and almost always leads to protracted counter-evidence with little positive result.

READ: 1 Greenleaf on Evidence, §§ 442–465 *a*;
Jones on Evidence, §§ 844–870;
Rice on Evidence, §§ 285–288;
Underhill on Evidence, §§ 347–354 *b*;
Wharton on Evidence, §§ 549–571;
Wigmore on Evidence, §§ 875–1144;
Rapalje on Witnesses, §§ 180–228;
Maxwell on Pleading and Practice, §§ 257–264.

§ 341. Of the Trial: Motion for a Nonsuit: Demurrer to the Evidence.

Where the plaintiff has the affirmative of the issue, and has introduced his evidence, if the defendant regards the evidence

as legally insufficient to make a *prima facie* case in support of the plaintiff's claim, he may decline to offer evidence in his own favor and move for a *judgment of nonsuit* against the plaintiff. If this motion prevails a judgment of nonsuit is rendered which closes the case and usually awards costs to the defendant; but is no bar to the immediate institution of another suit of the same character by the plaintiff. If the motion is denied the case proceeds as if it had not been made. An ancient method of taking advantage of such insufficient testimony was by a *demurrer to the evidence*. This demurrer admitted the truth of the matters established by the evidence, but denied that they legally entitled the plaintiff to a verdict. The judgment of the court on this demurrer was a final judgment and a bar to further actions. Where the defendant has the affirmative of the issue, the plaintiff may in like manner demur to his evidence, and a judgment on this demurrer will be final.

Rem. Still another method, available to either party under similar conditions, is to waive the privilege of producing testimony to meet the insufficient adverse evidence, and to submit the cause to the jury with a request to the court to instruct them to find a verdict in his favor. In most instances this latter method is now adopted in preference to a demurrer to the evidence, though motions for nonsuit are still in common use.

READ: Andrews, American Law, §§ 776, 778, 780–783;
Stephen on Pleading, § 124;
Starkie on Evidence, pp. 797, 798, 806–810;
McKelvey on Evidence, §§ 283–287;
Maxwell on Pleading and Practice, §§ 279, 280;
Foster's First Book of Practice, pp. 387–395.

§ 342. Of the Trial: the Charge to the Jury.

When the evidence is completed, and the arguments of counsel have been made, it becomes the duty of the judge to instruct the jury in those rules of law which are to guide them in arriving at their verdict. These instructions constitute the *charge to the jury*, and must not only state the law correctly, but state it so clearly and completely as to enable the jury to properly apply the evidence, and to decide legally every question embodied in the issue. If either party desires the judge to give any particular instructions to the jury he must frame them in written or

oral *requests to charge,* according to the local custom, and submit them in due season to the court; and a refusal of the judge to incorporate into his charge any legal proposition, which the requesting party has a right to have communicated to the jury, is an error for which the judgment may be reversed and a new trial granted. To any such refusal, as well as to the insertion by the judge of any objectionable matter into the charge, the aggrieved party must take immediate exception in order that it may be made to appear upon the record as a ground of error.

Rem. The power of a court to direct a jury what verdict they must render, in order to conform to the law and the evidence, seems to be generally conceded in cases where but one verdict could be legally sustained; but in some States it is the custom to permit the jury first to exercise their own discretion, and if they fall into error then to correct it by reversal or new trial.

READ: Andrews, American Law, §§ 784, 785;
Starkie on Evidence, pp. 584–616, 764–810;
Thayer on Evidence, pp. 183–262;
Wigmore on Evidence, §§ 2550–2559;
Maxwell on Pleading and Practice, §§ 291–312.

§ 343. Of the Trial: Deliberations and Verdict of the Jury.

The charge of the judge being completed the jury retire under the custody of an officer, and *deliberate in private* upon the questions submitted to them; having before them the pleadings, documents, depositions, and other physical objects comprised in the evidence. The *oral testimony* they are expected to remember; and if they do not recollect it they should return to the court room, and hear it read from the official notes of the judge and other officers. They cannot examine any witnesses by themselves, nor can they lawfully communicate to one another any material or relevant fact which has not been regularly introduced in the testimony. If they are in doubt concerning any question of law which was, or should have been, embraced in the charge they may return and request additional instructions. When, after due deliberation, they *cannot agree* on a decision they must report the disagreement to the judge who, if he deems the prospect of agreement hopeless, takes back the papers, discharges them from further duty in the case, and orders a new trial before another jury. When they do agree they appear in

court and announce their *verdict.* In reaching their conclusions they must be governed by the law and the evidence or their verdict will be invalid; although they are not bound to believe the testimony of individual witnesses if it appears to them incredible, even when it has not been contradicted.

Rem. The verdict of a jury may be either general or special. A *general verdict* finds the issue in general terms for the plaintiff or defendant, and is presumed to embrace a decision of every question of fact presented in the issue. A *special verdict* recites in detail all the facts as the jury consider them to have been proved, and submits them to the court with the statement that if, upon said facts, the plaintiff is in law entitled to a verdict they find one in his favor, — naming the thing or damages awarded, — with his costs; otherwise for the defendant, with his costs. The special verdict is seldom adopted except in complicated cases where the issues are numerous or the rules of law obscure, although its use would certainly relieve a jury trial from many of the difficulties and uncertainties which now attend it.

READ: Andrews, American Law, §§ 786, 789;
Stephen on Pleading, §§ 122–126;
Starkie on Evidence, pp. 811–879;
McKelvey on Evidence, §§ 24–32;
Rice on Evidence, §§ 292–296, 321;
Maxwell on Pleading and Practice, §§ 313–334.

§ 344. Of the Trial: Stay of Judgment: Motion in Arrest: Motion for a New Trial.

The verdict of a jury is of no practical effect until it is accepted by the court and made the basis of a judgment. Two methods of objecting to its acceptance are open to the defeated party: (1) By a motion in arrest of judgment; (2) By a motion for a new trial. A *motion in arrest* may be made where it is apparent on the face of the record that the verdict is improper, or that a judgment in pursuance of it could not be sustained. If this motion prevails the court will order a *repleader,* or reconstruction of the pleadings as recorded from the point where the first material defect appears, and another trial on the issues thus amended. Where a verdict has been improperly rendered for the defendant, and the record shows that neither on his present pleadings, nor on any others that he can offer, a verdict in his favor could lawfully be given, the court, without directing a re-

pleader or new trial, may order a *judgment non obstante veredicto* to be entered for the plaintiff. A *motion for a new trial* is based on errors not apparent on the record. Any fault in the proceedings, whether wilful or otherwise, which would render a judgment upon the verdict, as it stands, a perversion of justice, and which cannot be reached by a motion in arrest because not apparent on the record, may be the ground for a new trial. Among these faults are: (1) Illegal conduct of one or more of the jurors in relation to the action, or of the prevailing party in relation to the jury; (2) Material contradictions between the facts found by the verdict and the facts evidently established by credible testimony; (3) Palpable variance between the rules of law delivered in the charge of the court and the rules by which the jury must have been guided in order to reach such a verdict as they have rendered; (4) Erroneous admission or exclusion of evidence to the prejudice of the defeated party; (5) Errors in the charge of the court manifestly influencing the verdict to the injury of the defeated party; (6) Repugnancy or uncertainty in the verdict; (7) An award of damages so excessive or so inadequate as to indicate corruption or gross mistake on the part of the jury. On a motion for a new trial for causes not already within the knowledge of the court the causes must be set forth in the motion, and on the motion issues may be joined and witnesses examined as on other questions of fact.

Rem. Numerous defects in the record were once available on motion in arrest. By the various *statutes of jeofails and amendments*, particularly those of 27 Eliz. ch. 5 and 4 Anne, ch. 16, it is now provided that no defect of form shall be permitted to defeat a judgment, unless it has been made the ground of a special demurrer at the proper time in the course of the pleadings, — thus giving the opposite party an opportunity to amend or the court to render a decision on which a writ of error would lie. Moreover, even substantial defects will now be aided by the verdict itself where the decision of the jury necessarily covers the matter omitted or erroneously alleged, and could not have been rendered unless such matter had been proved to their satisfaction and to the acceptance of the judge. But when an allegation essential to the statement of a cause of action is entirely wanting in the pleadings, or the record contains assertions which show that the party making them has no ground of action or defence a verdict in his favor will not cure the defect.

READ: Andrews, American Law, § 790;
Stephen on Pleading, § 127;
Starkie on Evidence, pp. 798–806;
Maxwell on Pleading and Practice, §§ 343–399;
Foster's First Book of Practice, pp. 395–397.

§ 345. Of the Judgment.

When a verdict is accepted by the court, and no motion in arrest or for a new trial has been interposed, it is followed by a judgment. A *judgment* is the decision of a court, awarded and pronounced by the judge, upon some question legally submitted to it. Judgments are either interlocutory or final. An *interlocutory judgment* is a decision of the court upon some question arising during the proceedings in an action, and for these there are numerous occasions in nearly every suit at law. A *final judgment* is the decision which puts an end to the action itself. Final judgments may be rendered in the following cases: (1) Upon *nonsuit*, — where the plaintiff, having commenced an action, abandons it, or on the trial fails to produce *prima facie proof* of the matters alleged by him in his pleadings; (2) Upon *retraxit*, — where the plaintiff comes personally into court, after his declaration has been filed, and voluntarily withdraws his suit, and admits that he has no cause of action; (3) Upon *default*, — where the defendant does not appear to defend, and the plaintiff takes judgment against him for the debt or damages and costs; (4) Upon *confession*, — where the defendant in an action to recover a debt acknowledges the indebtedness in court, and the plaintiff takes judgment against him for the debt and costs; (5) Upon *nihil dicit*, — where the defendant appears but refuses to plead according to the due course of the proceedings, and the plaintiff takes judgment against him for his debt or damages and costs; (6) Upon *demurrer*, — where an issue of law which is decisive of the action is presented to the court, and the prevailing party takes a judgment for his costs, and if he be the plaintiff for his debt or damages also; (7) Upon a *verdict* rendered by a jury. The effect of a judgment upon nonsuit is simply to terminate the present action, and does not prejudice the future claims of either party. All other forms of judgment conclude both the parties and their privies as to all matters which were embraced in the issue, and were necessarily

passed upon by the jury or the court in arriving at the judgment, whenever the same questions concerning them are raised in any subsequent action which is brought between the same parties to accomplish the same purpose. Questions thus determined once for all are called *res judicata*, and when pleaded in bar constitute the defence known as *former recovery*. A judgment cannot be collaterally attacked except for want of jurisdiction in the court which rendered it or for fraud in its procurement, but may be vacated or reversed or modified upon a writ of error or appeal.

Rem. In all cases where a judgment awards a debt or damages, except upon the verdict of a jury, its amount must be ascertained before the judgment either by agreement of the parties, or by a proceeding called a *writ of inquiry*, or a *hearing in damages* in the presence of the judge or of some other person appointed for that purpose. In judgments rendered upon the verdict of a jury the amount named in the verdict must be followed in the judgment, unless it exceeds the sum named in the declaration. When this occurs the plaintiff must enter a *remittitur* for the excess, and take judgment only for the amount claimed, or the judgment will be reversed. When in the opinion of the judge the amount awarded by the verdict is excessive, and a new trial should on that account be granted, a remittitur may also be entered for the excess by the prevailing party with the consent of the court, and the verdict thus be saved. The recovery of *costs*, both as to the right thereto and the amount thereof, is usually regulated by local statutes.

READ: Andrews, American Law, §§ 776, 787, 788, 791, 792;
Stephen on Pleading, § 129;
Maxwell on Pleading and Practice, §§ 18, 159, 962;
Foster's First Book of Practice, pp. 368–377.

§ 346. Of Stay of Execution: Audita Querela: Appeal: Writ of Error.

The process by which a final judgment is enforced against the property or person of the defeated party is called a *writ of execution*. This issues out of the court as a matter of course, upon the rendition of the judgment, unless it is *stayed* by the judge, or is prevented by its payment or by some other satisfaction of the judgment which is accepted by the victor and entered on the record. An execution may be stayed by the judge on account of either one of three proceedings: (1) Audita

Querela; (2) Appeal; (3) Writ of Error. An *audita querela* is a proceeding in which the defeated party, in a motion for relief, seeks a stay of execution on the ground that since the judgment was rendered he has been legally released or discharged from its obligations. An *appeal* is a method of removing a cause, upon which an inferior tribunal has passed judgment, into a court of superior jurisdiction for another investigation of the issues of fact and law. Appeals are regulated by local statutes, and may or may not vacate the judgment of the court below; but they do not usually prevent the execution of the judgment when it imposes a specific active duty which it is necessary that some one should immediately perform. In the ordinary actions at common law, however, an appeal stays the execution until the final judgment in the higher court. A *writ of error* may operate as a *supersedeas*, or stay of execution, if instituted before execution issues, and may be either unconditional or upon adequate security to the victorious party; or the court may issue the execution and protect the defeated party by a bond.

Rem. Other proceedings of similar purpose and results are known to the local laws of several of our States, such as motions in error, petitions for a new trial, etc. These follow in their general method the more universal proceedings above described.

READ: Andrews, American Law, §§ 794–804;
Stephen on Pleading, § 131;
Maxwell on Pleading and Practice, §§ 953, 972–989;
Foster's First Book of Practice, pp. 290–308.

§ 347. Of the Execution.

A *writ of execution* is a process, directed to the sheriff or other proper officer, commanding him to satisfy the judgment upon the body or the property of the defeated party, or to reinstate the prevailing party in the possession of the property of which he has been deprived. An execution issued against the body of the defeated party is called a *capias ad satisfaciendum;* and is served by arresting him and committing him to prison, there to be detained until he is discharged by due course of law. An execution against the personal property of the defeated party is called a *fieri facias*, and is served by seizing and selling so much of his goods and chattels as may be needed for the payment of

the judgment debt. An execution issued against the real property must conform to the liability of such property to be taken on execution under the local law. In some States the corporeal real property may be levied on under a *fieri facias*, and sold under a subsequent order of the court called a *venditioni exponas*. In other States the corporeal real property must be appraised, and so much thereof as will satisfy the judgment must be deeded by the sheriff to the prevailing party. In still other States the possession of the corporeal real property or some proportional part thereof must be delivered to the prevailing party, to be held by him until its income pays the debt. The execution in an action of *ejectment*, when the plaintiff obtains judgment, is called a *habere facias*, and is served by the sheriff by ejecting the defendant, and putting the plaintiff into peaceable possession of the land. An execution in *replevin*, on a judgment for the defendant on his pleading an avowry or cognizance with a demand for the restoration of the property to him, is called a *writ of retorno habendo*, and is served by the sheriff by taking the property from the plaintiff who replevied it and delivering it to the defendant. In an action of *detinue* the execution directs the sheriff to put the plaintiff in possession of the property, and where this is impossible to levy for its value on the property of the defendant. An execution on a judgment for the defendant for his costs in any of these actions is enforced against the property of the plaintiff by *fieri facias* if his property is personal, and by process conformable to the local law if his property is real. After an execution has been served according to its precept it must be *returned to court* by the sheriff, with an account of his doings endorsed thereon. If the judgment has been satisfied by the levy the proceedings in the action are at an end. If it is unsatisfied, other executions may be issued from time to time, and for that purpose the judgment may be revived by *scire facias* whenever it becomes necessary until the entire debt or property has been recovered.

Rem. According to the ancient law corporeal property alone could be taken on execution, since incorporeal property could not be seized by the sheriff and delivered to the creditor or to a purchaser on the execution sale. Under our modern law the species of property subject to execution is designated mainly

by local statutes. Real property, whether corporeal or incorporeal, if it can be so set apart from other property as to be of value to a purchaser or the execution creditor, and is not exempt from execution under the Homestead Acts of the State, is generally open to a levy. Corporeal personal property of all kinds may be taken, except those articles which are exempted by statute as being essential to the protection of industrial or domestic life. Choses in action may be reached, if capable of legal reduction to possession, by an execution based upon a previous garnishment. In fine, the law now ordinarily subjects all kinds of property to the satisfaction of judgment debts, unless its physical character or public policy forbids.

READ: Andrews, American Law, § 793;
Stephen on Pleading, § 130;
Maxwell on Pleading and Practice, §§ 527–562;
Foster's First Book of Practice, pp. 377–382.

SECTION V

OF THE COURTS OF EQUITY

§ 348. Of Equity: Courts of Equity: Equity Maxims.

Equity signifies equality or justice, and when the word is used in general works on jurisprudence it is sometimes defined as "the correction of that wherein the law, by reason of its universality, is deficient." In the system of the Common Law, however, it denotes certain remedial processes by which relief can be afforded in cases whose peculiar circumstances place them beyond the reach of the ordinary courts. The *courts of common law*, adhering to their ancient customs and refusing to take jurisdiction over causes for which no precedent existed, left five classes of private legal controversies entirely without redress. These were: (1) Cases requiring a preventive remedy; (2) Cases involving more than two antagonistic parties; (3) Cases to which the customary forms of common law actions were not adapted; (4) Cases in which a judgment for damages, or for the restoration of specific property, afforded no adequate relief; (5) Cases in which the defendant had a just defence but under the current rules of pleading and procedure was unable to present it. In these cases the sole resort of the suitor was to the king in person, who by his chancellor investigated and decided the controversy; thus gradually establishing *a new tribunal* side by side with the courts

of common law, but with practically unlimited jurisdiction and able to apply its remedies to every species of private injury. Until the reign of Richard II (A. D. 1377–99) the authority of this tribunal was chiefly spiritual; but at that time it began to issue *writs of subpœna*, summoning the parties into court as witnesses, and then detaining them until they complied with its decrees. By this means it obtained control over the persons of the parties, and became able to enforce its orders under penalty of perpetual imprisonment. During the next two centuries the growing power of this tribunal aroused the apprehensions of the courts of common law, and its authority was often called in question; but in the reign of James I (A. D. 1616) the king himself set these matters at rest by deciding that the chancellor could grant relief even against the judgment of a court of common law. Since that date equity jurisdiction has rapidly expanded. In this country it is sometimes vested in the courts of common law, sometimes in distinct judicial bodies. Under the *New Procedure* both systems are combined, and legal and equitable remedies may be sought and applied in the same action.

Rem. During the development of courts of equity certain fundamental principles have become established as rules for their guidance in every species of controversy. These are called the "*Equity Maxims*," and are as follows: (1) Equity will provide a remedy whenever a legal right requires protection, and other courts are unable to afford it; (2) Equity acts in view of the substance of a transaction rather than its form; (3) Equity regards that as having been done which was agreed or directed to be done; (4) Equity interprets the conduct of parties in the light of their obligations, and as being intended to fulfil them; (5) Equity acts directly upon the person, compelling action or forbearance, not upon the subject-matter of the controversy; (6) Equity redresses wrongs by enforcing rights, not by awarding compensation for their infringement; (7) Equity promotes equality of right or duty between parties jointly interested or obliged; (8) Equity adopts the classifications and distinctions of the common law courts in reference to titles, estates, and interests in property; (9) Equity prefers legal titles to equitable titles, when the legal title is of equal justice with the equitable; (10) Equity prefers the elder of two conflicting equitable titles when both are of equal justice; (11) Equity requires that he who invokes its aid in any transaction must be ready to perform, in reference to that transaction, whatever justice may demand;

(12) Equity will refuse its aid to parties who, in the same private transaction, have already been guilty of fraud or other wrong; (13) Equity will deny relief to persons who, through wilful laches or neglect, have slumbered on their rights until it is no longer possible to do exact justice between the parties, or until innocent third persons have acquired rights which would be prejudiced if the court were now to interfere; (14) Equity having once assumed jurisdiction of a controversy, on any equitable ground whatever, will retain it and administer complete justice upon all grounds between the parties. The application of these maxims to the infinitely varied questions which fall within the cognizance of courts of equity enables them, in most cases, to arrive at right conclusions; and the numerous special doctrines derived from them now constitute the body of law called "*equity jurisprudence*," which is as definite and positive a system of rules as those interpreted and applied by the courts of common law.

READ: 3 Bl. Com., pp. 46–55, 426–455;
Barbour, Rights of Persons and Property, pp. 50–53;
Andrews, American Law, §§ 804 *a*–812, 826–828;
Clark, Elementary Law, §§ 35–37;
Adams on Equity, Introduction;
Story on Equity Jurisprudence, §§ 1–58;
Willard on Equity, pp. 33–49;
Merwin on Equity and Equity Pleading, §§ 1–28, 110–142;
Fetter on Equity, §§ 1, 2, 7–20;
Tiedeman on Equity, §§ 1–24, 472–475;
Pomeroy on Equity, §§ 1–128, 359–431;
Bispham on Equity, §§ 1–15, 37–48, 583;
Beach on Equity, §§ 1–24;
Beach on Pleading and Practice in Equity, §§ 1–10;
Foster's First Book of Practice, pp. 309–315.

§ 349. Of the Sphere of Equity Jurisdiction: Injunctions.

Three classes of cases require the interference of a court of equity: (1) Those which involve the application of a preventive remedy; (2) Those where the parties to the controversy are more than two in number; (3) Those where the subject-matter of the controversy is either wholly or partially of such a nature that a complete and adequate remedy cannot be obtained in any other tribunal. The specific *preventive* remedy employed in courts of equity is known as an injunction. An *injunction* is a mandate issuing out of a court of equity, and enjoining the respondent under suitable penalties to perform, or to refrain from performing, some designated action. Injunctions are of various species: (*a*) *Prohibitory injunctions*, which forbid action;

(*b*) *Mandatory injunctions*, which command action; (*c*) *Temporary injunctions*, which preserve matters *in statu quo* until the controversy can be finally determined; (*d*) *Perpetual injunctions*, which impose permanent duties or forbearances on the respondent; (*e*) *Ex parte injunctions*, which are granted on the application of the petitioner without a formal hearing of the parties, and in some extreme emergencies without previous notice to the respondent. In granting an injunction the court may require the petitioner to *give a bond* to indemnify the respondent against unjust loss, or may impose any other terms upon the parties which equity demands; and except in the case of a perpetual injunction may at any time *modify or rescind* its preventive mandate. An *injunction binds all persons* to whose knowledge it may come, though they may not yet have been made parties to the suit.

Rem. The tendency of courts of equity, in modern times, is to grant injunctions in all cases where the redress, which the petitioner could obtain if the threatened wrong were perpetrated, would be less advantageous to him than the immediate application of a preventive remedy. In pursuance of this tendency injunctions are now issued: (1) To *prevent fraud* of every description, whether in contracts, conveyances, litigations, or in the exercise of family rights; (2) To *prevent irreparable injury* to real property by waste, nuisance, or trespass, or to personal property by the infringement of patents, copyrights, or trademarks, or by the destruction or conversion of irreplaceable articles like heirlooms or original works of art; (3) To *prevent injuries to health and comfort* from impending nuisances offensive to the senses, or calculated to disturb the peace or security of the petitioner; (4) To *prevent unlawful interference with liberty of contract* or labor; (5) To *prevent slander or libel* injurious to property or commercial interests; (6) To *prevent the invasion of family rights*, as by forbidding the marriage of female wards without the consent of their guardians, or restraining husbands from abusing their wives, or parents from oppressing their children. In short, it would appear that there is no limit, beyond which equity cannot go, when justice demands its interposition either because the threatened wrong would be irremediable, or because the only other remedies involve such protracted or expensive litigation as to seriously impair their value.

READ: Andrews, American Law, §§ 813–815, 830, 846–850, 855, 865;
Clark, Elementary Law, § 247;
Adams on Equity, pp. 194–199, 206–219;
Story on Equity Jurisprudence, §§ 861–959 *b*;

Willard on Equity, pp. 341–408;
Merwin on Equity and Equity Pleading, §§ 29–39, 780–847;
Fetter on Equity, §§ 185–193;
Tiedeman on Equity, §§ 478–491;
Pomeroy on Equity, §§ 1337–1374;
Bispham on Equity, §§ 399–465;
Beach on Equity, §§ 638–780;
Beach on Pleading and Practice in Equity, §§ 753–787;
Daniell's Chancery Pleading and Practice, pp. 1613–1697;
Maxwell on Pleading and Practice, §§ 681–733;
Foster's First Book of Practice, pp. 357–362.

§ 350. Of the Sphere of Equity Jurisdiction: Multipartite Controversies.

A cause of action of which the courts of common law would take cognizance if the controversy were confined to two parties, — a plaintiff and defendant, — becomes the subject of equity jurisdiction whenever the necessary parties are more than two. Instances where this condition of affairs furnishes the sole reason for equity interference are chiefly found in actions of (1) Account; (2) Interpleader; (3) Contribution; (4) Bills of Peace. An *action of account* between two parties may be brought in a court of common law, but equity alone is able to adjust an account between three or more parties. A *bill of interpleader* in a court of equity is the only remedy where property in the possession of one person is claimed by two or more independent parties, between whom the possessor is unable to decide. The rights of a single claimant could be determined in an action of replevin or assumpsit; but any number of claimants can be brought by the possessor into a court of equity, and be there compelled to plead among themselves and submit to its decision, at their own expense or that of the disputed property. An *action of assumpsit for contribution* may be brought by one of two joint obligors who has satisfied the entire obligation, in order to recover from the other his proportionate share; but if the obligation jointly binds three or more parties, the suit must be in equity. Where several persons hold by separate titles a privilege which they enjoy in common, like a right of way or use of water, and their enjoyment is disturbed by one wrongdoer, each can sue alone at law for the injury caused by his own disturbance; but to avoid a multiplicity of suits, and because the several wrongs proceed from a single source, the parties may all unite in equity in one petition for re-

lief, called for that reason a *bill of peace*, and in the name of all, or in the name of one on behalf of all, may secure the protection of their various rights.

Rem. In these four cases the principal if not the only ground of equity jurisdiction is the multipartite character of the cause of action, out of which the controversy has originated, which in all other respects would be a proper cause of action in the courts of common law. Where, however, the cause of action is in its own nature equitable and, no matter what the number of the parties were, would come within the jurisdiction of the equity courts, the fact that three or more parties are interested in its determination merely constitutes an additional and not a qualifying reason why it falls within the cognizance of the equity courts, — as in the case of multipartite mortgages and trusts.

READ: Andrews, American Law, §§ 833, 841, 842;
Adams on Equity, pp. 199–206, 220–228, 239–247;
Story on Equity Jurisprudence, §§ 441–529, 659–683, 800–851;
Willard on Equity, pp. 85–105, 313–327, 707–728;
Merwin on Equity and Equity Pleading, §§ 48–52, 576–598, 884–897;
Fetter on Equity, §§ 6, 164–167, 201, 202;
Tiedeman on Equity, §§ 511–519, 533–536, 566–574;
Pomeroy on Equity, §§ 1319–1329, 1420, 1421;
Bispham on Equity, §§ 479–486, 505–524;
Beach on Equity, §§ 838–854, 873–882;
Daniell's Chancery Pleading and Practice, pp. 1506–1575;
Story on Equity Pleadings, §§ 291–298;
Maxwell on Pleading and Practice, §§ 734–744.

§ 351. Of the Sphere of Equity Jurisdiction: Controversies in which Courts of Equity alone can give Complete and Adequate Relief.

Controversies over which courts of equity have already claimed jurisdiction on the ground that they alone could in such cases give *complete and adequate relief* may be roughly grouped into the following classes: (1) The specific performance of contracts; (2) The rescission of contracts; (3) The reformation and cancellation of written instruments; (4) The amelioration or enforcement of penalties and forfeitures; (5) The management and partition of joint estates; (6) The administration of trust estates; (7) The adjustment of mortgages and liens; (8) The assignment of choses in action; (9) The settlement of the conflicting claims of *bona fide* purchasers; (10) The election between alternate

rights to property; (11) The determination of the rights of joint obligors; (12) The regulation of the conflicting rights of creditors; (13) The protection of the rights of married women, infants, and insane persons; (14) The conduct of proceedings in aid of suits at law; (15) The enforcement or inhibition of judgments and awards; (16) The suppression of useless litigation.

Rem. Controversies whose subject matter is, either in whole or in part, of such a character that final and adequate justice can be done between the parties only by a court of equity can neither be enumerated nor accurately classified, since they vary with changing conditions and increase in number and species with the advance of society. Several of those above mentioned are of comparatively recent recognition, but these suggest no limits to its future evolution. Whenever and wherever a legal right exists, for whose violation no adequate redress can be obtained in other courts, the sphere of equitable remedies will extend, and its authority will be ample to afford the requisite relief. It is difficult to imagine what subject can be beyond the powers of a tribunal whose control over the parties can be exercised, if necessary, by their perpetual imprisonment, and in whose hands the sword of justice can thwart the threatened or avenge the finished wrong.

READ: Story on Equity Jurisprudence, §§ 59–440;
Merwin on Equity and Equity Pleading, §§ 54–62;
Fetter on Equity, §§ 3–5, 21–23;
Pomeroy on Equity, §§ 129–358, 801–974;
Bispham on Equity, §§ 16–36, 174–260, 280–294;
Beach on Equity, §§ 1090–1113.

§ 352. Of Equity Jurisdiction over the Specific Performance of Contracts.

Courts of equity have authority to compel contracting parties to *perform their contract obligations*, in cases where no money damages would be an adequate compensation for their failure to perform. This authority extends to both oral and written contracts; and will be exerted even in aid of oral contracts which, under the Statute of Frauds, should have been reduced to writing, if the party to be bound thereby has fraudulently prevented such reduction, or has recognized the existence and validity of the contract by partly performing it or by receiving its benefits. The contract may relate to the possession or ownership of real property or of irreplaceable personal property, or in certain cases to a temporary personal service. It must be valid in law, just and

equitable between the parties, mutually binding upon both, and capable of being carried into effect at the present time in pursuance of the order of the court; and all conditions precedent to the right of the petitioner to its immediate enforcement against the respondent must have been fulfilled.

Rem. A court of equity will not issue an order which is manifestly futile, nor undertake to enforce a duty whose execution would require its perpetual supervision. Hence, however just may be the claim of a petitioner that a certain contract obligation should have been fulfilled, yet if its performance has now become impossible a court of equity must leave the injured party to his remedy for damages at law. So where the contract calls for the performance of a personal service covering a considerable period of time, like a contract of partnership or a contract to marry, a court of equity cannot stand guard over the parties to compel them to discharge their respective daily obligations, but relegates them to the courts of law for such relief as they may there be able to obtain.

READ: Andrews, American Law, § 837;
Adams on Equity, pp. 77–92;
Story on Equity Jurisprudence, §§ 712–799 *b*;
Willard on Equity, pp. 261–302, 309–312;
Merwin on Equity and Equity Pleading, §§ 63–76, 731–779;
Fetter on Equity, §§ 176–184;
Tiedeman on Equity, §§ 361–367, 492–504;
Pomeroy on Equity, §§ 1400–1412;
Bispham on Equity, §§ 361–398;
Beach on Equity, §§ 566–637.

§ 353. Of Equity Jurisdiction over the Rescission of Contracts.

A court of equity also has authority to *rescind a contract* which it would be inequitable to enforce. In general, a contract entered into honestly and understandingly by both parties will bind them according to its terms, however disadvantageous to one or the other of them its performance may be. But where either party has practiced any fraud upon the other; or has taken advantage of any confidential relationship between them; or has exercised undue influence over the other; or where the contract itself is contrary to public policy; or where both parties have entered into the contract under a mutual mistake, — it is within the province of a court of equity to protect the just rights of the parties by decreeing that the contract shall be null and void.

Rem. Although every contract into which fraud or mistake enters is either *ipso facto* void, or is voidable at the option of the injured party, and an action based upon it can therefore be successfully defended in a court of law; yet as all apparently valid outstanding contract obligations are always a menace to the liberty and property rights of the obligors, while the evidence on which the ability to prove their fraudulent or mistaken character depends is in most cases ephemeral; no adequate perpetual protection to the parties bound thereby can be secured except by annulling the contract itself without awaiting the institution of an action to enforce it, and by placing on the records of the court of equity permanent and conclusive proof that its obligations are destroyed.

READ: Andrews, American Law, § 837 *a*;
Story on Equity Jurisprudence, §§ 59–440;
Willard on Equity, pp. 51–84, 145–259;
Merwin on Equity and Equity Pleading, §§ 40–42, 54–62, 396–575;
Fetter on Equity, §§ 75–103;
Tiedeman on Equity, §§ 106–121, 175–240;
Pomeroy on Equity, §§ 129–358, 801–974;
Bispham on Equity, §§ 16–36, 174–260, 280–294;
Beach on Equity, §§ 25–147.

§ 354. Of Equity Jurisdiction over the Reformation and Cancellation of Written Instruments.

The *correction of mistakes* made by the parties in the language of their written instruments is also within the province of the courts of equity. Courts of law take cognizance of written instruments according to their written language as interpreted by fixed legal rules, whatever may have been the real intention of the parties; and do not permit them to offer evidence to prove that through error or mistake the language fails to present their actual meaning. Courts of equity, however, have authority to ascertain and carry into effect the exact intention of the parties, and for this purpose to *reform the instrument* by substituting for the original words and phrases others more precisely expressing their desires. Courts of equity may also *cancel instruments* apparently creating obligations, whose enforcement would be contrary to justice, either because the instrument is invalid, or was obtained by fraud, or was executed under a mistake of fact, or because the obligation is already satisfied. Thus the holders of forged documents, or of voidable contracts, or of invalid deeds, or of notes or checks that have been paid but

not delivered to their makers, may be compelled to bring them into court to be destroyed or surrendered to the proper claimant. But if the instruments are void upon their face no such relief is necessary.

Rem. To warrant a court of equity to cancel or correct an instrument, because of a mistake in its language or its legal effect, the mistake must have been *common to both* parties, since if the instrument as it stands embodies the purpose and intention of one party it cannot be amended in the interest of the other without imposing upon the former an obligation which he never consented to incur. In this case equity cannot interfere, but must leave the parties to the operation of the ordinary rules applied by courts of law.

READ: Andrews, American Law, § 838;
Adams on Equity, pp. 166–193;
Story on Equity Jurisprudence, §§ 694–711;
Willard on Equity, pp. 303–308;
Merwin on Equity and Equity Pleading, §§ 77–93;
Fetter on Equity, §§ 194, 195;
Tiedeman on Equity, §§ 506–508;
Pomeroy on Equity, §§ 1375–1377;
Bispham on Equity, §§ 466–478;
Beach on Equity, §§ 538–555.

§ 355. Of Equity Jurisdiction over the Amelioration or Enforcement of Penalties and Forfeitures.

A contract for the performance of a future action sometimes contains an express stipulation for the payment of a specific sum of money by the promisor to the promisee in case of its non-performance. This sum may be considered either as a *penalty* or as *liquidated damages*. Where no standard exists by which the proper amount of damages, to be awarded for the non-performance, could be measured by a jury, and the non-performance would probably occasion damage equal to the amount named in the contract, the sum is recognized by the courts as liquidated damages which the parties have adjusted in advance, in order to avoid the difficulties of ascertaining it after the injury has occurred. In other cases the sum is usually regarded as a penalty. Both courts of law and courts of equity respect an agreement concerning liquidated damages, and leave the parties to the remedy which they have provided for themselves. Courts of law act in the same manner in reference to penalties and enforce the

agreement to the same extent. But courts of equity, considering the stipulation for a penalty merely as a means for securing the performance of the contract, or the payment of an adequate compensation in case of non-performance, relieve the promisor from liability for any excess over a proper recompense to the promisee. *Forfeitures* annexed to contracts or conveyances, especially when intended to secure the fulfilment of stipulated duties within specified times, are in like manner subject to relief in equity.

Rem. The underlying principle expressed in this form of equitable relief is that justice requires that compensation should be measured by the actual injury. Hence, where the amount of a prospective injury is not determined by previous agreement, equity requires that whenever it occurs it should be ascertained by actual investigation, and only that amount should be recovered. In many contracts, providing for the performance of a certain duty within a certain time, a delay in the performance may occasion no loss whatever, or a loss easily compensated by a subsequent performance coupled with the payment of a recompense in money. In such contracts a stipulation for a forfeiture in case of non-performance will be decreed inoperative in equity, if the failure to perform has resulted either from *accident* or the conduct of the promisee, and without fault of the promisor; and the promisor will be permitted to perform after the stipulated time has expired, and thus prevent the forfeiture. This is what is meant by the common maxim that "*in equity time is not of the essence of a contract,*" — a maxim which is true only when applied to cases of the character above described; for time is of the essence of the contract, even in equity, whenever it is expressly made so by the terms of the agreement or the nature of the subject-matter, or where the rights of innocent third parties are involved. Common examples of this indulgence obtainable in equity are the privileges conceded to mortgagors to redeem their property by paying the mortgage debt with interest after the prescribed pay-day; to lessees to save their estates by paying or tendering their rent after the date named in the lease. Over forfeiture and *penalties imposed by statutes* courts of equity have no jurisdiction.

READ: Story on Equity Jurisprudence, §§ 1301–1326;
Fetter on Equity, §§ 71–74;
Tiedeman on Equity, §§ 25–37;
Pomeroy on Equity, §§ 432–460;
Beach on Equity, §§ 1013–1021.

§ 356. Of Equity Jurisdiction over the Management and Partition of Joint Estates.

The jurisdiction of the courts of equity over *joint estates in real property* arose out of the inability of a court of law to force the different owners to disclose their titles, and to sever their estates by executing reciprocal conveyances in pursuance of its decrees. These purposes the authority of the courts of equity over the persons of the parties enabled them to accomplish. Under the same authority the enjoyment of *incorporeal rights in land* may be aparted in any manner calculated to conserve the interests of all the owners, and secure to each his proportion of the privilege. Over the use and division of *joint personal property* courts of equity have always taken jurisdiction, on the ground that courts of law afford no remedy to the co-owners against the owner who may be in possession. While joint property of any kind remains undivided claims by one owner against the others for an account of profits, or for contribution toward the cost of necessary repairs, and other mutual obligations growing out of the joint ownership, are also cognizable in equity.

Rem. This wide authority of equity over the joint enjoyment or partition of common property has been extended by modern statutes to the disposal of the property itself, so that where the property cannot be divided equally a court of equity may direct it to be *sold* and the proceeds apportioned among the co-owners, or may award the whole to one co-owner and compel him to pay the others for their shares.

READ: Andrews, American Law, §§ 852, 853, 856;
Adams on Equity, pp. 229–238, 248–266;
Story on Equity Jurisprudence, §§ 530–632, 646–658, 684–687;
Willard on Equity, pp. 693–705;
Fetter on Equity, §§ 172–175;
Tiedeman on Equity, §§ 521–525;
Pomeroy on Equity, §§ 1378–1392;
Bispham on Equity, §§ 487–504, 528–540;
Beach on Equity, §§ 981–1007.

§ 357. Of Equity Jurisdiction over the Administration of Trust Estates.

The distinction between legal and equitable estates in real property, which arose out of the introduction of uses to evade the Acts of Mortmain, is applied to personal property also, and equi-

table estates of all kinds, under the name of "*trusts*," now occupy one of the most important places among the subjects of equity jurisdiction. A *trust* involves an obligation resting upon one party, called the *trustee*, in whom the legal estate in the property is vested, to administer the property for the benefit of some other party, called the *cestui que trust*. While the trustee alone can sue and be sued in a court of law, the *cestui que trust* is in equity regarded as the true owner of the property; and in order to protect his rights the courts of equity assume entire control of the trust estate, appoint and remove trustees, compel them to perform their duties, and require them to account to the *cestui que trust* for the benefits derived from the estate.

Rem. Trusts are divisible on different grounds into various classes: (1) Private Trusts and Public Trusts; (2) Executed Trusts and Executory Trusts; (3) Active Trusts and Passive Trusts; (4) Conventional Trusts and Legal Trusts. A *private trust* is one created for the benefit of individuals or families. Unless it arises by operation of law, and is therefore a *legal trust*, it requires a *settlor* who creates the trust out of his own legal estate; a *trustee*, in whom the legal estate is vested by the settlor for the benefit of the *cestui que trust;* and a definitely ascertained and designated *cestui que trust*, on whom the benefit may be conferred and by whom the obligations of the trust may be enforced. A *public trust*, called sometimes *a charitable use*, is one created for the benefit of the sick, poor, or ignorant members of the community at large, or for the maintenance of some other useful public work. A public trust does not require the specific designation of the individual beneficiaries, nor of the person who shall act as the trustee. If the creator of the trust defines its general character, and appropriates to it certain described property, the courts of equity will supply the rest by appointing a trustee and directing him in the employment of the property; and if the method of employment prescribed by the creator of the trust becomes impracticable they will, under the power conferred upon them by the *cy pres* doctrine, change the method and accomplish the result as far as possible. In several of our American States these differences between public and private trusts have been abolished by statute, and all trusts for whatever purposes must possess the requisites and are governed by the rules applied to private trusts. An *executed trust* is one whose purpose and method of administration are fully defined by the settlor at the time of its creation, — the trustee having no duty but to follow its directions. An *executory trust* is one whose precise pur-

pose or method is left to the discretion of the trustee, who then as nearly as he can, and by such means as he possesses, must carry out its general intention. An *active trust* is one which imposes certain duties upon the trustee other than that of holding the legal estate to serve the equitable, while the *cestui que trust* has no right in the property except to receive its designated benefits as they accrue. A *passive trust* is one in which the trustee has performed all his prescribed administrative duties although the legal estate still resides in him, while the *cestui que trust* is equitably the real and only actual owner of the property, and generally has a right to have the legal estate immediately transferred to him. A *conventional trust* is one created by the act of the settlor, either conveying the legal estate to some other person to hold for the benefit of the *cestui que trust*, or covenanting that he will himself stand seised of the legal estate for the same purpose. No special form of words is necessary for the creation of a conventional trust, provided the intent clearly appears; nor is a writing required unless the trust created is of such a nature that under the Statute of Frauds a memorandum signed by the settlor is prescribed. Even acts alone are sometimes sufficient, as where one person deposits money in a savings bank in trust for another, retaining the bank-book in his own possession without the knowledge of the beneficiary. Any species of property may be granted in a conventional trust, and for any object which is not illegal or immoral; and any person may create such a trust who has the legal capacity to convey the property, or may become the trustee who has the legal ability to receive and administer a trust estate, or may become the *cestui que trust* if he is legally qualified to enjoy its benefits. Moreover, the same person may be both the settlor and the trustee, or the settlor and the *cestui que trust*, in the absence of fraudulent intent and prejudice to the rights of others. A *legal trust* is one created by operation of law in view of the relations or dealings of the parties. Legal trusts are of two kinds: (1) Resulting trusts; and (2) Constructive trusts. A *resulting trust* is an obligation implied by law, devolving upon the grantee of a legal estate and compelling him to hold the property for the use and benefit of the grantor or of the person who procured the grant to be made. The principal occasions on which the law implies this obligation are the following: (a) Where the owner of property, without receiving a consideration, conveys the legal estate therein to another person upon a trust which cannot be fulfilled, or which does not exhaust the beneficial interest in the property, or under circumstances which clearly indicate that the grantor expected to receive its benefits himself; (b) Where any person with his own money purchases or unites with others in the purchase of property, and the conveyance is taken in the name of some one other than himself, his wife, his

child, or a near relative to whom he owes a moral duty of support and to whom, therefore, a gift of the property might be intended. A *constructive trust* is an obligation implied by law, devolving upon one who has obtained the legal estate in property by accident, mistake, or fraud, and whom equity compels to account to the real owner for its benefits, and in certain cases to convey the legal estate to him. The duties of a trustee, under any form of trust except a passive trust, are to take the property into his possession and manage it with skill, fidelity, and diligence for the promotion of the object of the trust.

READ: Andrews, American Law, §§ 817–824, 844;
Walker, American Law, §§ 169–172, 174;
Pingrey, Real Property, §§ 1048–1101;
Rice, Real Property, §§ 212–226;
Warvelle, Real Property, pp. 119–125, 360–365;
Boone, Real Property, §§ 159–171 *b*;
Tiffany, Real Property, §§ 91–102;
Adams on Equity, pp. 26–76, 97–106;
Story on Equity Jurisprudence, §§ 960–982, 998–1003, 1058–1074 *a*, 1124–1300;
Willard on Equity, pp. 409–615;
Merwin on Equity and Equity Pleading, §§ 143–395;
Fetter on Equity, §§ 104–140;
Tiedeman on Equity, §§ 252–330 *w*;
Pomeroy on Equity, §§ 578–590, 976–1097;
Bispham on Equity, §§ 49–148;
Beach on Equity, §§ 148–168, 202–286.

§ 358. Of Equity Jurisdiction over the Adjustment of Mortgages and Liens.

In whatever light a mortgage may be regarded by the courts of common law in equity it is considered as a mere lien to secure an obligation, and the claims of the parties against one another and the property are so adjusted as to fulfil the obligation without imposing an unreasonable burden upon either. Thus while awaiting pay-day equity will protect the property against waste by its possessor; and if necessary will place it in the hands of a *receiver* for administration. After pay-day, if the debt remains unpaid, equity will entertain a petition from the mortgagee for a *foreclosure* of the mortgage, and appropriate the property to the payment of the debt. In States whose local laws permit a *strict foreclosure* this appropriation may be made by decreeing that the title of the mortgagee to the property shall become absolute on a certain future date if the debt is not then paid. In other States

the appropriation consists in a sale of the property; the payment of the debt, interest, and costs out of the proceeds; and the delivery of the surplus to the mortgagor or other parties in interest. In some States the law provides that if the property does not yield enough to satisfy the claim, a judgment and execution may be given for the balance due. On the other hand, where pay-day has elapsed, and the mortgagee refuses to accept the debt upon its tender to him by the mortgagor, the mortgagor may bring a *petition to redeem*, upon which the court will order an accounting between the parties, and the discharge of the mortgage lien on payment of the balance thus ascertained. Courts of equity exercise a similar authority over deeds of trust, mortgages with power of sale, chattel-mortgages, and the liens of vendors, vendees, mechanics, co-tenants, and all other incumbrancers, — enforcing their obligations and protecting all parties against fraud and oppression. No contemporary agreement between the parties can defeat this jurisdiction, for a transaction which is "once a mortgage is in equity always a mortgage," although a subsequent contract upon a new consideration may supersede the mortgage, and change the character of their relations.

Rem. Courts of equity first assumed jurisdiction over mortgages in order to protect the mortgagor against the forfeiture of his right to redeem the property, by failing to pay the debt at pay-day, in cases where the failure had been caused by inevitable accident or by the fraudulent conduct of the mortgagee. Later, these courts gave relief in all cases of non-payment on pay-day, and extended the time for payment to a date fixed by themselves, upon the application of either party, in a proceeding to foreclose or redeem. This privilege of redeeming after pay-day is called the mortgagor's *equity of redemption.*

READ: Andrews, American Law, §§ 835, 851;
Adams on Equity, pp. 110–134;
Story on Equity Jurisprudence, §§ 1004–1035 *c*;
Willard on Equity, pp. 106, 107;
Merwin on Equity and Equity Pleading, §§ 640–718;
Fetter on Equity, §§ 141–157;
Tiedeman on Equity, §§ 384–470;
Pomeroy on Equity, §§ 1179–1269;
Bispham on Equity, §§ 149–161, 351–360;
Beach on Equity, §§ 287–318, 394–520;
Maxwell on Pleading and Practice, §§ 570–624.

§ 359. Of Equity Jurisdiction over Assignments of Choses in Action.

The assignment of choses in action, and of future contingent interests in property, was invalid under the ancient common law, and recourse to the courts of equity was therefore necessary to protect the just rights of such assignees. Later the courts of common law so far receded from their former doctrine as to admit the assignability of contracts concerning property, and of rights of action for certain injuries to property; but other assignments, unless aided by local statutes, are still enforcible only in equity. An *equitable assignment*, like an assignment at law, must clearly designate the thing to be assigned and purport to transfer it to the assignee, to whom also the fact of the intended assignment must be duly communicated. If the property assigned is in the hands of a third person, or is a debt due from him, notice to him is essential to render him liable to the assignee; and in the absence of such notice, and of actual knowledge of the assignment, he may deal with the assignor as if no assignment had been made. Whether the assignee of a chose in action may sue the obligors at law in his own name, or in the name of the assignor, or must resort to equity, is determined by local statutes.

Rem. The assignee of a chose in action takes it subject to all the equities subsisting between the assignor and the holder of the property assigned, unless the property is a debt evidenced by a negotiable bill or note whose transfer before maturity, in the ordinary course of business, vests the property in the transferree free from all equities which are not apparent on its face or are implied by law.

READ: Story on Equity Jurisprudence, §§ 1036–1057 *b*;
Merwin on Equity and Equity Pleading, §§ 94–109;
Fetter on Equity, §§ 158–163;
Tiedeman on Equity, §§ 371–382;
Pomeroy on Equity, §§ 591–676, 1270–1302;
Bispham on Equity, §§ 162–173, 261–279;
Beach on Equity, §§ 319–381.

§ 360. Of Equity Jurisdiction over the Conflicting Claims of Bona Fide Purchasers.

A *bona fide purchaser* is one who in good faith, and without notice of antagonistic claims, has paid valuable consideration for

an article of property. When two or more *bona fide* purchasers claim the same property against each other, as may sometimes happen through the mistake or fraud of the vendor, only a court of equity can determine whose title shall prevail, since all the titles are equally good at law. The principles applied to such a case are these: (1) The property will be awarded to that purchaser who has the superior equity, — that is, to the one who in justice has the best right to it, — namely, the right of the more diligent above the right of the less diligent, or the right of the person misled over that of his misleader; (2) If the equities are equal, and one of the purchasers had acquired the legal title, the property will remain in him; (3) If the equities are equal, and neither has acquired a legal title, the one whose equitable right was first obtained prevails. Having determined these questions the court decrees such transfers and releases as may be necessary to extinguish the conflicting claims, and quiet the title of the prevailing purchaser.

Rem. *Notice* is knowledge, either actually possessed or imputed by law. The law imputes to every person of normal capacity the knowledge of every fact of which it was his duty to inform himself, and which he might have ascertained by reasonable inquiry; and also of every fact appearing on a public record which is by law made constructive notice to all persons subsequently becoming interested in the matters stated in the record. A purchaser having such knowledge, actual or imputed, of antagonistic claims to the property at the time he pays the purchase money, cannot be a *bona fide* purchaser as against the parties by whom these claims were made; but must take his title subject to them as they may be afterwards interpreted and sustained by the courts.

READ: Adams on Equity, pp. 135–165;
Merwin on Equity and Equity Pleading, §§ 898–914;
Fetter on Equity, §§ 52–70;
Tiedeman on Equity, §§ 40–102;
Pomeroy on Equity, §§ 677–800, 1127–1178;
Bispham on Equity, §§ 307–325;
Beach on Equity, §§ 382–393, 521–537.

§ 361. Of Equity Jurisdiction over the Election between Alternate Rights to Property.

Cases sometimes occur in which *alternate rights* of property are presented to a person, between which he is compelled to elect;

and, having made his election, he is obliged to surrender to other persons all his claims to the property rights which he thereby rejects. Over all such cases courts of equity exercise whatever authority the circumstances demand; compelling the parties to make their election, render accounts, execute instruments, and surrender property, until their legal relations are finally adjusted, and each one is secured in the enjoyment of his rights.

Rem. Among the cases sometimes requiring this interference of the courts of equity are the following: (1) Where one person, by deed or will, gives to another person certain property and by the same instrument provides that other property, already belonging to the proposed donee, shall henceforth belong to some third person, — thereby obliging the donee to elect whether he will accept the gift and surrender his own property, or will retain his own property and refuse the gift; (2) Where a husband devises or bequeaths property to his wife in lieu of dower, and after his death she is required to choose between her legal rights as his widow and the provision made for her in the will; (3) Where a debtor makes a valuable gift to his creditor as an offset to the debt, and the creditor is compelled to decide whether he will receive the gift as payment or reject the gift and insist upon his claim; (4) Where a testator makes in his will a provision for his child, and subsequently to the execution of the will gives directly and completely to the child other valuable property, and after his death a controversy arises whether the gift was in addition to the testamentary provision, or was an advancement between which and the testamentary provision the child must now elect; (5) Where a parent dies intestate, having given in his lifetime to any one of his children an advancement of less value than the child's proportionate share of his intestate estate would be, and the child is driven to his election whether he will keep the advancement as his share, or put it into *hotchpot* with the whole estate and take advantage of its equal distribution; (6) Where the owner of property by his contract, deed, or will converts its legal character from real to personal, or from personal to real, in order more effectually to carry out his general intention, and it becomes necessary to regard it sometimes and for some purposes as real, and at other times and for other purposes as personal, and in its alternating character to appropriate it as he has directed.

READ: Adams on Equity, pp. 92–97;
Story on Equity Jurisprudence, §§ 1075–1123 *a*;
Fetter on Equity, §§ 24–51;
Tiedeman on Equity, §§ 123–174, 347–359;

Pomeroy on Equity, §§ 461–577;
Bispham on Equity, §§ 295–306;
Beach on Equity, §§ 1033–1089.

§ 362. Of Equity Jurisdiction over the Relations of Joint Obligors: Exoneration: Contribution: Subrogation.

When several persons lie under a *joint obligation* their reciprocal relations are often such as to require the interference of a court of equity in order to enforce their respective rights against one another. Thus where *sureties for a debtor* are apprehensive of a suit against themselves for the amount, they may summon the principal into a court of equity, and compel him to *exonerate* them by paying off the debt. Where one obligor has satisfied the entire obligation and seeks for *contribution* from the others, apart from the fact that the number of the obligors may compel him to resort to equity, an equal distribution of the burden may be unattainable by any process which the courts of law can employ, and equity alone be able to give him adequate relief. Where sureties are obliged to pay a debt they are *subrogated* to all the rights of the creditor against the debtor, and are entitled to an assignment of the claim with its collateral securities.

Rem. The subrogation of a debt to the surety who has paid it involves the transfer to him of all mortgages, liens, or other muniments by which the debt was secured, and these he can enforce in equity as if he were the original creditor.

READ: Andrews, American Law, § 836;
Adams on Equity, pp. 106–109, 267–271;
Willard on Equity, pp. 107–127;
Merwin on Equity and Equity Pleading, §§ 599–639;
Fetter on Equity, §§ 168–170;
Tiedeman on Equity, §§ 527–531;
Pomeroy on Equity, §§ 1416–1419;
Bispham on Equity, §§ 326–339;
Beach on Equity, §§ 797–837.

§ 363. Of Equity Jurisdiction over the Conflicting Rights of Creditors: Receivers: Marshalling Assets.

Where the property of a debtor which is liable for his debts is so situated that it cannot be taken for that purpose by legal process, a court of equity may assume over it such control as to secure its preservation from waste or unlawful appropriation, and

make a proper distribution of it among the rightful claimants. One method of accomplishing this object is to place the property in the hands of a receiver. A *receiver* is an officer of a court of equity, and acts under its supervision. Pursuant to the order of the court he takes possession of the property; ascertains the amount of the different claims; liquidates them from the proceeds of the property, and returns the surplus to the debtor. Another method, applicable to cases where two or more debts are secured by a pledge of the same property, and one of the creditors has an additional security, is that of *marshalling the assets;* which consists in compelling the doubly secured creditor to exhaust his additional security before resorting to that which he holds together with the others, in order that as much as possible shall be left for the satisfaction of the other claims.

Rem. Receiverships are now frequently employed for the winding up of partnerships, corporations, and co-tenancies; for the settlement of the affairs of infants and lunatics who have no guardians; for the protection of mortgaged property from waste; for the preservation of testate estates when the executor is incompetent; for the appropriation of such property of judgment debtors as cannot be reached by execution; for the rescue of trust property which is being abused by the trustee; for the management of the property of a husband who refuses to obey the order of a court directing him to apply its income to the support of his separated wife; and for cases in general where no other judicial proceeding seems adequate to the emergency. A common example of *marshalling the assets* is that of two mortgages on the same piece of land to two different mortgagees, — the earlier of which mortgages covers another piece of land. Here, though the earlier mortgage debt must be fully satisfied before any of the property can be appropriated to the payment of the later debt, yet equity will compel the earlier creditor to resort first to the land which is covered by his mortgage alone, and to hold the other land only for the payment of the residue.

READ: Andrews, American Law, § 865;
Adams on Equity, pp. 271–277;
Story on Equity Jurisprudence, §§ 633–645, 1430–1444;
Willard on Equity, pp. 337–339, and ch. xiii;
Merwin on Equity and Equity Pleading, §§ 1002–1010;
Fetter on Equity, §§ 171, 203, 204;
Tiedeman on Equity, §§ 532, 577–588;
Pomeroy on Equity, §§ 1330–1336, 1414;
Bispham on Equity, §§ 339–350, 576–580;
Beach on Equity, §§ 781–796, 931–980;

Beach on Pleading and Practice in Equity, §§ 717–752;
Daniell's Chancery Pleading and Practice, pp. 1715–1769;
Maxwell on Pleading and Practice, §§ 832–868.

§ 364. Of Equity Jurisdiction over the Rights of Married Women, Infants, and Lunatics.

The strictness with which the courts of common law adhered to the doctrine that the personality of a wife is merged in that of her husband obliged the courts of equity, in the interest of justice and humanity, to take some notice of her separate existence. Thus where it became necessary for her to separate from her husband on account of his cruelty, and either voluntarily or by compulsion he had made provision for her *separate maintenance*, equity assumed authority to superintend this provision and enforce her rights. Again, where property was granted or devised to her for *her sole and separate use* apart from any control of her husband, although this gave her no standing in a court of law yet equity, unwilling to leave her without some method of vindicating her rights, regarded her as the real owner of the property and recognized her acts and contracts in reference to it as if she were a *feme sole*. This attitude of the courts of equity toward the property rights of married women has now extended to her personal rights, and in some instances to her family rights also, on the ground that where the law concedes the existence of these rights and provides no method for their enforcement, the courts of equity have jurisdiction to afford her adequate relief.

Rem. The courts of equity in their capacity of agencies through which the sovereign, as *parens patriæ*, exercised his supervision over infants, idiots, lunatics, and other incapables, originally had immediate jurisdiction over these abnormal persons also. In modern practice, this jurisdiction is generally lodged in probate courts, and other minor tribunals having special equity powers, with an appellate jurisdiction in the higher equity courts.

Read: Andrews, American Law, § 816;
Adams on Equity, pp. 278–298;
Story on Equity Jurisprudence, §§ 983–997, 1327–1429;
Willard on Equity, pp. 617–692;
Merwin on Equity and Equity Pleading, §§ 868–883;
Tiedeman on Equity, §§ 244–249, 331–345;
Pomeroy on Equity, §§ 1098–1126, 1303–1314;
Bispham on Equity, §§ 541–555;
Beach on Equity, §§ 169–201, 1022–1032.

§ 365. Of Equity Jurisdiction over Proceedings in Aid of Suits at Law: Discovery: Perpetuation of Testimony: De Bene Esse: Ne Exeat.

The personal control which courts of equity obtain over the parties to an equity proceeding enables them to promote, in many ways, the pursuit of judicial remedies in the courts of common law. Thus where a plaintiff, who desires to institute an action, cannot otherwise ascertain what persons should be made defendants he may file in a court of equity a *bill of discovery*, praying that the persons named in the bill be cited into court to answer under oath to certain interrogatories contained in the bill. The same proceeding may be employed during the progress of a suit, whenever either party requires information or access to documents which are in the possession of the other. Where any person apprehends that at some time in the future he may be obliged to bring an action which he cannot yet lawfully commence, and that witnesses who are now available may then be dead or out of reach of process, or that documents now existing and accessible may then be destroyed, he can bring in equity a *bill to perpetuate testimony*, praying that the evidence may be taken at once in some proper manner, and be preserved among the records of the court. Where, after a suit has been commenced, either party has reason to fear that at the time of trial certain witnesses may be unable to attend and testify, a bill in equity praying the court to take their testimony *de bene esse*, or conditionally upon their absence, and preserve it in the records will afford the necessary relief. Where it is important that any party should remain within the State, in order that an expected decree of the court may be enforced against him, a *writ of ne exeat* may issue out of equity upon which he may be arrested, and held in custody until he gives sufficient bail to abide the decree. This writ is available in aid of causes pending in any court, particularly in actions of account, in proceedings for divorce and alimony, and in other suits in reference to which some act or disclosure of the party may be required.

Rem. The recent modification of the rules of evidence in courts of law allowing interested parties to testify in court in their own cases, and to be called as witnesses by adverse parties, and compelling them to produce documents when so directed by

a *subpœna duces tecum*, renders it possible to obtain many of the benefits above described without the aid of an additional proceeding in the nature of a bill of discovery. Testimony *de bene esse* may also in many cases be secured by an ordinary deposition, taken in the regular course of a suit at law.

READ: Andrews, American Law, §§ 843, 858;
Adams on Equity, pp. 1–25;
Story on Equity Jurisprudence, §§ 689–691, 1464–1516;
Merwin on Equity and Equity Pleading, §§ 43–47, 848–866;
Fetter on Equity, §§ 197–200;
Tiedeman on Equity, §§ 539–542, 549–562;
Bispham on Equity, §§ 556–567, 573, 581, 582;
Beach on Equity, §§ 855–872, 1008–1012;
Beach on Pleading and Practice in Equity, §§ 607–626;
Daniell's Chancery Pleading and Practice, pp. 480–487, 1698–1714, 1817–1839;
Story on Equity Pleading, §§ 299–325;
Maxwell on Pleading and Practice, §§ 87–100.

§ 366. Of Equity Jurisdiction over Proceedings in Aid of Judgments and Awards: Creditors' Bills: Removal of Cloud on Title: New Trials, etc.

Where an execution debtor has so concealed or fraudulently conveyed his property that the levy of an execution, issued on a judgment against him, has become impossible: equity will aid the enforcement of the judgment by permitting the execution creditor to file a *creditors' bill* against the debtor and the fraudulent grantee, compelling them to disclose their transactions and restore the property so that it may be taken on the execution. If the property be realty, and has already been levied on and sold under the execution notwithstanding its fraudulent conveyance, equity can *remove the cloud upon the title* of the execution purchaser, by obliging the fraudulent grantee or holder to give him a deed of release. The judgment of a court of common law cannot be formally vacated and set aside by a court of equity unless it was obtained by fraud, however unjust may be its effect upon the defeated party; but a court of equity may grant an *injunction against the victor*, forbidding him to enforce the judgment, and in this way fully protect the party's rights. Where the defeated party to an action, subsequently to the trial and after the verdict can no longer be reversed in the court of law, discovers new evidence which if it had been offered at the trial would probably have produced a different result, a court of equity can entertain a

petition for a new trial; and if upon the hearing it appears that the former verdict was erroneous, and that the defeated party was guilty of no negligence in not then adducing the evidence in question, the court of equity may compel the victor to submit to a new trial, under penalty of an injunction against the judgment already rendered.

Rem. An *award of arbitrators* cannot be enforced by execution unless it is incorporated in the judgment of a court. If it directs the payment of a sum of money, an action at law may be brought to recover it; but if it requires some act to be performed, such as the removal of a nuisance or the conveyance of land, the assistance of a court of equity may be necessary to enforce it. A court of equity can also *set aside an award* whenever misbehavior or fraud in the parties, or corruption, partiality, or illegal conduct on the part of the arbitrators, can be established.

READ: Andrews, American Law, § 834;
Story on Equity Jurisprudence, §§ 1450–1463;
Merwin on Equity and Equity Pleading, §§ 719–730;
Fetter on Equity, § 196;
Pomeroy on Equity, §§ 1395–1399, 1415;
Bispham on Equity, §§ 525–527, 568–572, 574, 575;
Beach on Equity, §§ 556–565, 883–930;
Maxwell on Pleading and Practice, §§ 480–494.

§ 367. Of Equity Jurisdiction over the Suppression of Useless Litigation.

A court of equity has power to terminate controversies and *prevent useless litigation* by a formal decree between the parties, establishing in detail their respective rights. This power is exercised chiefly in reference to titles to real property. Where the right of the true owner is unquestionable, and adverse claimants nevertheless are urging rights based upon ouster or imperfect titles or satisfied incumbrances, and thus vex him with the continual fear of future litigation, a court of equity upon a bill *quia timet,* praying that the title may be *quieted,* may put an end to all risk of further controversy by decreeing that the true title is in the petitioner, and compelling all the other claimants to give him releases, or to confess his title on the record of the court, and to surrender papers, and to do whatever other acts may be required to divest themselves of any color of right, whose assertion could hereafter subject him to annoyance.

Rem. In addition to all the powers hereinbefore described every court of equity of general jurisdiction has authority to meet the exigencies of any peculiar situation, for which no precedent has yet been established, by administering what is known as *general equitable relief*. Hence it is customary for petitioners in equity, in addition to their prayers for such redress or protection as they deem themselves entitled to receive, to pray also for such general relief as the subsequent developments of the case may show to be advisable.

READ: Andrews, American Law, §§ 840, 842;
Story on Equity Jurisprudence, §§ 825–851, **1445–1449;**
Willard on Equity, pp. 328–337;
Tiedeman on Equity, §§ 543–546;
Pomeroy on Equity, §§ 1393, 1394;
Boone, Real Property, §§ 512–534.

§ 368. Of Bills in Equity.

The methods by which a court of equity applies its various remedies are simple and flexible in the highest possible degree. The first step in the proceedings is the *filing of the bill*, or petition, with the clerk of the court. Bills in equity are of two classes: (1) Original Bills; and (2) Bills not Original. An *original bill* relates to matters not already in litigation in equity between the parties, and is the bill by which the proceedings are commenced. A *bill not original* relates to some matter already wholly or partially before the court; and is designed to add to, or continue, or in some other manner affect the proceedings instituted by an original bill. An *original bill contains:* (*a*) The title of the court and the name of the petitioner; (*b*) A narration of the facts which warrant the court in affording the relief desired, setting them forth with clearness and certainty and in ordinary language; (*c*) The interrogatories and demand for a discovery, when this is required by the petitioner; (*d*) A prayer for the specific relief sought by the bill; (*e*) The prayer for such general equitable relief as the court may find to be appropriate. The rules of equity pleading permit a *joinder of causes of action* in the same bill, but do not authorize the union of matters which are perfectly distinct and unconnected, or which require remedies of an independent character against several different defendants. An improper joinder of causes renders the bill *multifarious;* and if the court regards it as tending to confusion, and likely to produce difficulty at the

trial, it may order the petitioner to reduce the number of his claims and thereby simplify the bill.

Rem. When a bill not original alleges facts relating to the cause of action which have transpired since the commencement of the suit, or which bring in new parties, it is called a *supplemental bill*, and is in the nature of an amendment to the original bill. A bill not original whose purpose is to obtain the reinstatement of a suit which has been abated by the death of one of the parties, and to procure the appearance of his legal representatives, is known as a *bill of revivor*. A bill filed by the respondent disclosing some new feature of the controversy, and making it the basis of a counterclaim for relief, is called a *cross-bill*.

READ: Andrews, American Law, §§ 860, 863;
Adams on Equity, pp. 299–311, 402–416;
Merwin on Equity and Equity Pleading, §§ 915–939;
Story on Equity Pleading, §§ 1–48, 239–290, 326–402;
Beach on Pleading and Practice in Equity, §§ 81–165, 421–448, 481–515;
Daniell's Chancery Pleading and Practice, pp. 305–427, 480–487, 1506–1575;
Maxwell on Pleading and Practice, §§ 640–649, 667, 669, 671;
Foster's First Book of Practice, pp. 315–328, 344, 345 351–353.

§ 369. Of the Parties to a Bill in Equity.

All persons, natural or artificial, whose interests can be affected by the proposed decree of the court are *necessary parties* to a bill in equity, and until all such persons are in some way made participants in the litigation the court cannot proceed. Those who would naturally be co-petitioners, but refuse to be joined as such, may be made respondents; and if after the bill is filed it appears that some have been omitted they may be brought in by amendment, and until they are legally notified and have an opportunity to appear the suit will be suspended. A *misjoinder of parties* is cured by dismissing the bill as against the superfluous persons.

Rem. Parties in equity must sue and be sued in their own names, since the decree binds the persons, and those who are to be affected by it must be actually or legally before the court, and be subject to its orders.

READ: Andrews, American Law, §§ 861, 862;
Adams on Equity, pp. 312–323;
Merwin on Equity and Equity Pleading, §§ 944–958;

Story on Equity Pleading, §§ 49–238;
Beach on Pleading and Practice in Equity, §§ 40–80;
Daniell's Chancery Pleading and Practice, pp. 1–304;
Foster's First Book of Practice, pp. 328, 329;
Bliss on Code Pleading, §§ 72–81, 96–111 *a*.

§ 370. Of the Process in Equity: Appearance.

The *process* in a court of equity is a *subpœna* or citation, which regularly issues from the court upon the filing of the bill, and directs the persons named as respondents to appear on the proper return-day, and show cause, if any they have, why the prayer of the petition should not be granted. This process is *served* by the sheriff or other officer by reading, or by copy, or by publication, according to the local law. If necessary parties cannot be reached by process, and do not voluntarily appear, the case cannot proceed unless the action is *in rem;* then, after such notice as it is possible to give, the court may act upon the *res*, protecting the rights of absent parties by such methods as are practically available. An *appearance in equity* is usually made in person or by a *solicitor*, and upon entering his appearance the respondent must disclaim, or demur, or plead, or answer, as the exigency of his case demands.

Rem. Where a respondent who is served with process fails to appear he may be brought in on a *capias*, if his answer is important to the petitioner, as it may be in bills for a discovery or an account; otherwise the bill may be taken *pro confesso* for the default in appearance, and the court may conduct the trial and render a decree without him.

READ: Andrews, American Law, § 644;
Adams on Equity, pp. 324–330;
Merwin on Equity and Equity Pleading, § 959;
Beach on Pleading and Practice in Equity, §§ 11–39, 166–190, 211–223;
Daniell's Chancery Pleading and Practice, pp. 428–479, 488–516, 533–541;
Foster's First Book of Practice, pp. 329–332.

§ 371. Of the Pleadings in Equity: Disclaimer: Demurrer: Plea.

A *disclaimer in equity* is a pleading in which the respondent disavows all interest in the subject-matter of the controversy, and prays that as to himself the bill may be dismissed. This disavowal must be universal and unqualified, or the petitioner is not bound

to accept it, but may demand a further answer. If he does accept it the decree follows the facts as proved by the petitioner, and admitted by the respondent. A *demurrer in equity* is a pleading in which the respondent points out some defect in the bill as a reason why he should not be compelled to answer further to its allegations. This defect must be apparent on the face of the bill, and may consist either in a want of jurisdiction in the court, or the incapacity of the parties to sue and be sued, or the absence of necessary averments from the bill itself. If this demurrer is sustained the petitioner may amend his bill and thus cure, if possible, the defects therein. If the demurrer is overruled the respondent may plead or answer according to the nature of his further defences. A *plea in equity* is a special pleading in which the respondent urges some particular defence, and thus reduces the issue to a single point. Such particular defences are a want of jurisdiction in the court, the incapacity of the parties, or some statute or record or other matter of fact which of itself defeats the claim of the petitioner. If this plea, upon replication filed and issue joined, is sustained by sufficient proof, the petitioner may amend his bill, but if no amendment is possible the judgment on the plea will be a bar to his recovery on so much of the matter alleged in the bill as was put in issue by the plea. If the plea is overruled the respondent must answer over or a decree will be rendered against him.

Rem. The matters covered by the pleadings in equity resemble in substance those raised by the various defences in actions at law, but differ from them in the form and order of their presentation. Thus, as will be noticed, a plea to the jurisdiction in proceedings at law is represented in equity pleading by a demurrer where the defect is apparent on the record, and by a plea when the defect must be made evident by proof. A plea in abatement at law embraces the matter which in equity is urged either under a demurrer or a special plea, while a demurrer in equity also is used for the same purpose as a demurrer at law. A plea in equity sometimes corresponds to a plea to the jurisdiction or a plea in abatement, and sometimes to a traverse or special issue at law. The other purposes of the pleadings at law are met in equity by the answer.

READ: Andrews, American Law, §§ 859, 864;
Adams on Equity, pp. 331–343;
Merwin on Equity and Equity Pleading, §§ 961–980, 988;

Story on Equity Pleading, §§ 433–844;
Beach on Pleading and Practice in Equity, §§ 224–330;
Daniell's Chancery Pleading and Practice, pp. 542–710;
Maxwell on Pleading and Practice, §§ 650–652, 657–661;
Foster's First Book of Practice, pp. 333–339.

§ 372. Of the Pleadings in Equity: Answer: Replication.

An *answer in equity* is a denial or a confession and avoidance of all the material allegations of the bill. In it the respondent sets forth all those defences to the action on which he intends to rely, except such as are proper subjects for a plea or demurrer; and only those defences which are contained in the answer will be considered by the court. Any number of defences may be joined in the same answer if they are consistent with one another, as they must be if all are true; and each defence must then be stated distinctly and affirmatively, and with such particularity that the petitioner may know precisely what he has to meet. The respondent is concluded by his answer, and cannot depart from it unless he first amends it by leave of the court. While an answer may aver new matter, by way of confession and avoidance, it cannot make such new matter the basis of a claim for relief, — this being the proper function of a cross-bill. Respondents who are jointly interested should answer jointly; those severally interested may answer severally. Where the bill contains *interrogatories*, to which an answer is demanded under oath, the answer must specifically meet the interrogatories and be sworn to by the respondent. Upon the filing of the answer the petitioner may *amend his bill*, or may present a *replication* to which the respondent may rejoin by a new pleading or by amending his answer; and thus the pleadings may advance until they reach an issue on which a trial can be had. In modern practice the pleadings are usually perfected, and an issue formed, by amendments to the bill and answer.

Rem. An insufficient answer may be *excepted to* by the petitioner, and if the exception is sustained a further answer will be ordered by the court. The respondent may demur to one part of the bill, plead to another part, and answer the remainder; but cannot demur, plead, and answer to the entire bill at once, especially if the answer contains all the objections which are urged by the demurrer and the plea. Should he do this, however,

the petitioner may move to strike out the superfluous pleadings, or compel the respondent to elect between them. The pleadings in equity, at all times before final decree, are subject to further corrections by the court, upon motion of either party, in order that the real points in issue may be decided and embodied in the decree.

READ: Andrews, American Law, § 864;
Adams on Equity, pp. 343–361;
Merwin on Equity and Equity Pleading, §§ 981–986;
Story on Equity Pleading, §§ 345–906;
Beach on Pleading and Practice in Equity, §§ 331–420, 471–480, 553–606;
Daniell's Chancery Pleading and Practice, pp. 711–789, 828–835, 1587–1612;
Maxwell on Pleading and Practice, §§ 653–656, 662–665;
Foster's First Book of Practice, pp. 339–344.

§ 373. Of the Trial in Courts of Equity.

In courts of equity all issues of fact, as well as issues of law, may be heard and determined by the judge alone. Various methods of investigating facts may be employed. The judge may hear the testimony of the witnesses himself, or it may be taken in writing before masters in chancery, or in the form of depositions and presented to the court. In questions of peculiar difficulty the judge may frame an issue of fact, — called a "*feigned issue*," — and order the parties to submit it to a jury in a court of law by a suit brought for that purpose; and when the verdict of the jury is rendered the judge may accept and follow it or not, as to him seems reasonable and just. When the facts are all before the judge the case is closed by the arguments of counsel, or briefs may be presented and the oral argument be waived.

Rem. The rules of evidence in equity are substantially the same as those prescribed in courts of law, except in reference to the admission of oral testimony to explain, rebut, or correct a written instrument. In cases involving questions of fraud or mistake courts of equity permit the introduction of such testimony to whatever extent the justice of the case requires.

READ: Adams on Equity, pp. 362–373;
Merwin on Equity and Equity Pleading, §§ 991–1001, 1011, 1012;
Beach on Pleading and Practice in Equity, §§ 516–552, 627–716;
Daniell's Chancery Pleading and Practice, pp. 836–985, 1071–1147;
Maxwell on Pleading and Practice, §§ 639, 666, 668, 870–904;
Foster's First Book of Practice, pp. 344–349.

§ 374. Of the Decree in Courts of Equity.

The judgment of a court of equity is known as a *decree*. Decrees in equity are of three classes: (1) Decrees *pro confesso;* (2) Interlocutory decrees; and (3) Final decrees. A *decree pro confesso* is a decree granted against the respondent on his failure to appear, or to plead, or to answer, according to the order of the court. It assumes the allegations of the bill to be true, and until rescinded is as binding as any final decree; but it may be revoked during the same term of the court, on sufficient cause shown, and the respondent permitted to appear or plead. If not revoked during that term it becomes absolute, and then cannot be reversed except by a bill of review, or on a petition to rescind it on the ground of fraud. An *interlocutory decree* is a preliminary decree in favor of the petitioner upon the issues created by the bill and answer, and refers the cause to a master in chancery or some other tribunal for the settlement of questions of detail, such as the computing of accounts or damages, or the investigation of a title and the removal of incumbrances. Upon the report of the master, and its approval by the court, the final decree is rendered. A *final decree* is one which terminates the litigation, and awards to the respective parties whatever equity may demand. The final decree in all cases must be based upon and correspond with the allegations of the bill, and as the facts established by the evidence give form to the decree the bill may be amended after the evidence has been introduced, so as to lay a proper foundation for the decree.

Rem. When a final decree is rendered in favor of the respondent the bill is dismissed, so far as he is concerned, unless he has filed a cross-bill and has prevailed on the issues thereby created. When a final decree is granted in favor of the petitioner, or of the respondent on a cross-bill, it directs the adverse party, under a suitable penalty, to do or not to do the acts specified therein.

READ: Andrews, American Law, § 866;
Adams on Equity, pp. 374–395;
Merwin on Equity and Equity Pleading, §§ 995, 1013–1016;
Beach on Pleading and Practice in Equity, §§ 191–210, 449–470, 788–830;
Daniell's Chancery Pleading and Practice, pp. 517–532, 790–827, 986–1031;
Foster's First Book of Practice, pp. 349–351.

§ 375. Of Rehearing: Bill of Review.

At any time between the interlocutory and the final decrees the court may order a *rehearing* for the purpose of admitting new evidence, or introducing additional defences, or on any other sufficient grounds. After final decree a *bill of review* may be filed, without leave of the court, for errors of law apparent on the record; and, by leave of the court, for errors of fact disclosed by the discovery of new evidence. When employed to correct errors of law a bill of review is like a writ of error, and is governed by the same general rules. When employed to correct errors of fact, and for that purpose to introduce new testimony, it resembles an application for a new trial. If a bill of review is sustained the former decree is reopened, and a new hearing and judgment are granted.

Rem. The practice in this country sometimes allows a rehearing, after final decree, during the same or the next term of the court; but when the period for a rehearing once expires a final decree can be annulled only on an appeal or by a bill of review.

READ: Andrews, American Law, § 839;
Adams on Equity, pp. 396–401, 416–420;
Merwin on Equity and Equity Pleading, §§ 940–943, 1019, 1020;
Story on Equity Pleadings, §§ 403–425;
Beach on Pleading and Practice in Equity, §§ 831–884;
Daniell's Chancery Pleading and Practice, pp. 1459–1505, 1575–1586;
Maxwell on Pleading and Practice, §§ 670, 954–971;
Foster's First Book of Practice, pp. 354–357.

§ 376. Of the Execution in Courts of Equity.

Final process in equity runs only against the person, and an *execution* consequently takes the form of an attachment of the body of the party who neglects or refuses to comply with the decree. This execution issues upon the motion of the prevailing party, fortified by affidavits setting up the other party's refusal or neglect, on which the other party has a right to be heard; and if the court upon the hearing finds that he has been guilty of contempt, by wilfully disobeying its orders, it may impose upon him a fine, or cause him to be imprisoned until he does obey.

Rem. In courts of common law a judgment usually carries with it the obligation to pay costs to the prevailing party, the

amount of which is fixed by the local law. In courts of equity the prevailing party has generally no right to costs, but costs are in the discretion of the court which may deny them altogether, or award them to either party, or divide them between the parties as may seem just and reasonable. Where a decree imposes costs, or any other obligation on a party with which he is unable to comply, he may purge himself of the apparent contempt by proving his inability, and submitting to such other conditions as the court may prescribe.

READ: Merwin on Equity and Equity Pleading, §§ 1017, 1018;
Story on Equity Pleadings, §§ 426–432;
Beach on Pleading and Practice in Equity, §§ 885–1044;
Daniell's Chancery Pleading and Practice, pp. 1032–1070, 1150–1365.

SECTION VI

OF THE COURTS OF ADMIRALTY

§ 377. Of Maritime Law.

Maritime law is the law governing maritime affairs, or those affairs which pertain to commerce upon navigable waters. *Navigable waters*, in modern American law, include the high seas, and all those tidal and non-tidal rivers, lakes, and waterways, upon which passengers or merchandise can be transported in vessels between two or more independent States. Maritime law is the oldest of all systems of law which are now in force, having been developed from the customs of primitive navigators, and having descended to us through the Phœnician Greek, Roman, Continental, and English laws of the sea. Its American form is found in the Acts of Congress, and the decisions of the Admiralty Courts of the United States, and their appellate tribunals.

Rem. The necessity for a special system of laws regulating maritime affairs arises from two facts: (1) That since no individual State can exercise territorial jurisdiction over the high seas, or other waters outside of its own boundaries, any system of law which controls maritime affairs must proceed from the concurrent action of all the States whose vessels navigate the highways of commerce; (2) That since, in many cases, the defendants in maritime controversies are personally beyond the reach of process issuing from any court to which the plaintiff can have access, his right to an efficient remedy requires that he

should be allowed to bring his action directly against the vessel, or vehicle of commerce engaged in the transaction out of which his injury and his remedial right have sprung. Hence, maritime law is, in the *first place*, a universal system whose principles and general methods are everywhere the same; and, in the *second place*, a system administered by courts whose peculiar powers enable them to proceed *in rem* against the instrument of commerce irrespective of its ownership, and by their decrees against it bind not only such persons as have notice of the suit, but all other interested parties throughout the world.

READ: 3 Kent Com., Lect. xlii, pp. 1–21;
Dunlap on Admiralty, pp. 1–57;
1 Parsons on Shipping and Admiralty, pp. 3–24;
2 Parsons on Shipping and Admiralty, pp. 159–174;
Etting on Admiralty Jurisdiction, pp. 1–64;
Desty on Shipping and Admiralty, §§ 1–7;
Henry on Admiralty, §§ 1–13;
Benedict on Admiralty, §§ 1–12, 225–256;
Hughes on Admiralty, §§ 1–5;
Spencer on Marine Collisions, §§ 1–10.

§ 378. Of Marine Contracts: Marine Torts.

The *jurisdiction* of the admiralty courts extends to all controversies arising either out of marine contracts or marine torts. A *marine contract* is a contract concerning commerce by means of vessels upon navigable waters. A *marine tort* is a wrongful action or omission, occurring either on the land or on the water, whose injurious consequences fall upon a person or an object which at the time is located in or upon navigable waters. A wrong committed on the water, and inflicting injury upon a person or an object on the land, is not a marine tort. The jurisdiction of the admiralty courts over marine torts and contracts is not exclusive of the jurisdiction of the courts of equity and common law, unless the plaintiff is obliged by circumstances to seek his remedy by a suit *in rem* against the vessel.

Rem. A contract in relation to an object which is to be employed in commerce, as for the building of a ship, or in relation to the results of past commerce, as for the sale of commodities already transported, is not a marine contract. But contracts for the use or repair of vessels, or for their supplies or insurance, or for pilotage, towage, navigation, freight, or salvage and the like, are incidental to the pursuit of commerce, and are marine contracts cognizable in admiralty.

READ: 1 Kent Com., Lect. xvii, pp. 353–380;
Dunlap on Admiralty, pp. 57–84;
1 Conkling on Admiralty, pp. 1–47;
2 Parsons on Shipping and Admiralty, pp. 174–203;
Etting on Admiralty Jurisdiction, pp. 45–75, 82–86, 99–102;
Cohen on Admiralty, pp. 1–35;
Henry on Admiralty, §§ 16–22, 38–40;
Benedict on Admiralty, §§ 13–214 *a*, 257–262, 313–313 *b*, 607–645;
Hughes on Admiralty, §§ 6, 7.

§ 379. Of Vessels: Sale: Registry: Enrolment.

A *vessel*, as the term is used in maritime law, is any structure which floats upon the water, and is capable of being used, and is at present intended to be used, for the purposes of navigation and commerce. Its size, shape, and mode of propulsion are immaterial. Thus a steamship withdrawn from navigation, and used as a hotel, though still afloat is not a vessel; while a bathhouse built upon boats, in order that it may be moved with its contents from place to place, though firmly moored to the shore remains a vehicle of commerce. A vessel is a mere chattel and can be sold by an ordinary bill of sale, coupled with delivery if the vessel is in port; if the vessel is at sea, the bill of sale may be immediately delivered, and the delivery of the vessel may take place on its return.

Rem. To entitle a vessel engaged in foreign commerce to the protection of the United States it must be *registered* in the custom house of the collection district in which the home port of the vessel is located; and this registry must be renewed whenever the vessel changes owners, or is altered in form or burthen. If the vessel is employed in domestic commerce it must be enrolled in a similar manner, and obtain a *coasting license*.

READ: 3 Kent Com., Lect. xlv, pp. 129–150;
1 Parsons on Shipping and Admiralty, pp. 25–63, 78–89;
2 Parsons on Shipping and Admiralty, pp. 496–508;
Desty on Shipping and Admiralty, §§ 8–28, 53–67;
Benedict on Admiralty, §§ 215–224, 263–263 *a*;
2 Parsons on Contracts, pp. 272–280;
Hughes on Admiralty, § 157;
Spencer on Marine Collisions, §§ 11–13.

§ 380. Of the Ownership of Vessels.

The *builder* of a vessel is its first and original owner, unless by contract with other persons he has conferred the title upon

them. Thus a vessel built for other parties, to be paid for in instalments as the building progresses, remains the property of the builder until completed and finally transferred, if the building contract does not otherwise provide. When two or more persons own a vessel they are regarded by the law as *tenants in common*, and not as partners unless they have made themselves such by an express agreement; and neither has a lien upon the vessel for any expense he may have incurred on its account. Where there are only two owners, and they cannot agree as to the employment of the vessel, a court of admiralty may order the vessel to be sold and the proceeds divided. Where there are three or more owners the majority may control the use of the vessel, upon giving a bond of indemnity to the minority against its loss. The same privilege on the same conditions vests in the minority, if the majority refuse to employ the vessel. In either of these cases the expense and profit of the employment are confined to those owners by whom the vessel is used.

Rem. Where there are several owners the control of the vessel is often entrusted to one of their number who is called the "*managing owner*," and whose acts and contracts on their joint behalf bind all the others. Additional agents of the owners are the *ship's husband*, who has charge of the vessel in its home port, superintending its repairs and preparing it for a future voyage; and the *master* who, during the voyage is clothed with almost absolute authority over the vessel and over the persons and objects it contains.

READ: 3 Kent Com., Lect. xlv, pp. 151–157;
1 Conkling on Admiralty, pp. 318–343;
1 Parsons on Shipping and Admiralty, pp. 63–67, 90–131;
2 Parsons on Shipping and Admiralty, pp. 236–246;
Desty on Shipping and Admiralty, §§ 29–52;
Henry on Admiralty, §§ 23–25;
Benedict on Admiralty, §§ 264–266, 274–276;
2 Parsons on Contracts, pp. 258–260, 265–272;
Hughes on Admiralty, §§ 158, 159.

§ 381. Of the Hiring of Vessels: Charter-Parties.

Owners who do not themselves employ the vessel may lease it to other persons by an instrument in writing, called a "*charter-party.*" The lease may be for a definite period of time, or for a described voyage; and may convey the vessel only or cover

the vessel with all the apparatus and supplies necessary for the voyage. A charter-party for a voyage usually prescribes the number of days to be allowed for loading and unloading. These are called *lay-days*, and do not include Sundays or legal holidays; but any additional detention for these purposes entitles the owner to collect *demurrage*, which is a fixed rate of compensation for each day of delay, including Sundays and holidays.

Rem. Unless otherwise provided in the charter-party the owners guarantee the seaworthiness of the vessel against even latent defects; and if the lease is for a definite voyage they warrant that the vessel shall be ready for loading at the stipulated port, and that when loaded she shall proceed to her destination with reasonable despatch. The minor provisions of charter-parties are usually quite numerous, in view of the customs and exigencies of the various species of commerce, and are strictly interpreted and rigidly enforced.

READ: 3 Kent Com., Lect. xlvii, pp. 201–206;
1 Conkling on Admiralty, pp. 169–186;
1 Parsons on Shipping and Admiralty, pp. 274–337;
Desty on Shipping and Admiralty, §§ 196–216;
Benedict on Admiralty, §§ 287, 288, 297;
2 Parsons on Contracts, pp. 300–306;
Hughes on Admiralty, §§ 83–89.

§ 382. Of Maritime Liens.

The necessity under which a vessel often labors of procuring repairs or supplies in foreign ports, in order to prosecute its voyage, has given rise to the doctrine of maritime liens. A *maritime lien* differs from a common-law lien in that it requires no possession of the vessel by the lienor, but constitutes a charge upon it wherever it may go; and includes the right to seize and sell the vessel by judicial proceedings in order to satisfy the debt. One species of maritime lien is that which is presumed by law in favor of *material men*, whose business it is to repair vessels and furnish them with necessaries; and who have actually supplied to a foreign vessel, upon the order of the master and in the absence of the owners, certain materials or labor which were evidently needed by the vessel in order to enable it to reach its destination. Another maritime lien is created by a contract, called a *bottomry bond*, in which the master, being with his vessel in a foreign port and beyond reach

of assistance from its owners, is compelled to pledge the vessel as security for money borrowed in extreme necessity, to pay for repairs and supplies. A *respondentia bond* creates a maritime lien upon the *cargo* of a vessel, which the master is allowed to pledge in similar emergencies, when all other resources fail. These bonds are claims against the vessel or the cargo only, and not against the owners, and are consequently worthless if the property is lost before the voyage is completed. Hence they bear a high rate of interest, called *marine interest*, and for that reason are rarely resorted to when a contract with material men will answer the same purpose. Among the various maritime liens which may attach to any given vessel or cargo the latest takes precedence, on the ground that the debt which it secures is presumed to have been incurred for the benefit of all prior lienors as well as of the owners of the property. Great promptness in enforcing these liens is required of the respective claimants, but especially of the holders of bottomry bonds, lest other persons should be deceived into advancing money or supplies on the credit of a vessel already pledged beyond her estimated value.

Rem. No maritime lien exists when money is borrowed, or material or labor furnished, in a domestic port, although the local laws of many States confer a statutory lien upon the creditor. *Domestic ports* are those of the same State to which the vessel belongs; and in reference to these liens the different States of the American Union are foreign to one another. The *mortgage of a vessel* does not create a maritime lien, and is not enforcible in admiralty. The title of the mortgagee depends upon that of the owner, and hence is postponed to the titles of all persons whose claims grow out of a marine necessity.

READ: 3 Kent Com., Lect. xlix, pp. 352–363;
1 Conkling on Admiralty, pp. 73–106, 262–295;
1 Parsons on Shipping and Admiralty, pp. 132–169;
2 Parsons on Shipping and Admiralty, pp. 141–155, 322–337;
Etting on Admiralty Jurisdiction, pp. 86–98;
Cohen on Admiralty, pp. 189–205, 242–245;
Desty on Shipping and Admiralty, §§ 68–113;
Henry on Admiralty, §§ 41–73;
Benedict on Admiralty, §§ 267–273, 290–293 *a*;
Hughes on Admiralty, §§ 42–52, 175–188;
Waples on Proceedings in Rem, §§ 455–486, 542–546;
Smith, Personal Property, §§ 151–153;
2 Parsons on Contracts, pp. 260–264, 280–285.

§ 383. Of the Master of a Vessel.

The *master of a vessel,* during the voyage and in the absence of the owners, is an agent clothed with supreme authority over the vessel, cargo, crew, and passengers, and is responsible for its reasonable and effective exercise. He may bind the owners by *contracts* made on their behalf, though without their knowledge, in reference to matters relating to the usual employment of the vessel, and the means necessary for the prosecution of its voyage. He may *lease the vessel* by a charter-party in a foreign port; or pledge it by *bottomry* or its cargo by *respondentia;* and if the voyage be inevitably and permanently interrupted, and no other method of protecting the interests of his owners and shippers is available, he may *sell* the vessel and cargo to the best possible advantage, and hold the proceeds for future distribution among them. He may *imprison* and sometimes corporally punish *disobedient seamen,* and place under physical restraint any *passenger* who refuses to submit to proper discipline. If seamen become *mutinous* he may put them ashore even in a foreign country, and may leave them there when their further presence on the vessel would imperil its safety and that of the remainder of the crew.

Rem. The master of a vessel is *personally liable* for any abuse of his authority, as well as on any contract he may make on behalf of the vessel and its owners; and may be removed by a majority of the owners even though he is himself a part owner. By *gross misconduct,* causing serious damage to his owners, he may forfeit his entire wages, and in less grievous cases the losses he occasions them by unwarrantable acts may be deducted from the moneys due him on the settlement of their accounts.

READ: 3 Kent Com., Lect. xlvi, pp. 159–176;
1 Conkling on Admiralty, pp. 311–317;
1 Parsons on Shipping and Admiralty, pp. 68–74;
2 Parsons on Shipping and Admiralty, pp. 3–31;
Desty on Shipping and Admiralty, §§ 114–140;
Benedict on Admiralty, § 299;
Hughes on Admiralty, § 11;
2 Parsons on Contracts, pp. 332–336.

§ 384. Of the Seamen.

All persons who by contract are employed to render, during a voyage, any service on board the vessel which contributes

in any manner to the prosecution of the voyage are *seamen.* This class, therefore, includes all officers other than the master, and all clerks, cooks, and other workmen male or female, as well as the sailors who actually engage in navigating the vessel. The *contract* of the seamen with the master or the owners is made by a written agreement, called the "*shipping articles,*" in which the voyage or the term of service and the rate of wages are particularly described, and by which penalties are provided for the violation of the contract. These articles are liberally construed in favor of the seamen, and any stipulation they may make to waive the customary remedies for the enforcement of their rights is void. Having signed these articles the seamen must report for duty at the appointed time, and await their orders from the master. If they *refuse to sail* on the ground that the vessel is not seaworthy a majority of them, with the mate, may demand an inspection of the vessel; which will be made at their expense if it is found in good condition, and with their release from duty if it proves to be unsafe for the intended voyage. During the voyage the seamen are subject to the master, and he may compel their obedience by imprisonment, corporal punishment, or in great emergencies by taking life. The seamen have a right to be *returned in the vessel* to the port from which they shipped unless the articles otherwise provide, but this right may be forfeited by persistent insubordination, or they may lose it by such sickness or other disability as renders their transportation to the home port impracticable. When *discharged in a foreign port* for disobedience the master must receive them back if they repent and offer to return to duty; and when discharged with their consent, or as a result of the compulsory abandonment of the voyage, their passage home must be procured at the expense of the vessel, or, if this be impossible, at the expense of the govenment through its local consuls.

Rem. Seamen hired for the voyage are entitled to their entire wages though they become incapable of service during the voyage from sickness, or other injury incurred in the performance of their duty, unless at the time of shipment they misrepresented their state of health or physical ability. For extraordinary services required by the master on account of marine

disaster, or the illness of other seamen, they can claim no extra compensation; their general duty to the vessel obliging them to do all in their power for its safety under all the exigencies of the voyage. The right to *wages may be forfeited* by desertion without sufficient cause and refusal to return, or by any conduct which justifies the master in discharging them before the voyage is completed; and lesser grades of fault on their part may warrant the owners in withholding a sufficient portion of their wages as an indemnity for the injury they have caused. When the shipping articles stipulate that the wages shall be proportioned to the time of service they are payable accordingly, except in cases where the seamen are wrongfully discharged before the voyage ends; then they are entitled to be paid at the stipulated rate for the actual time of service, and for such additional period as will suffice for their return to the port from which they sailed. The *unpaid wages* of seamen are not assignable, nor can they be attached. They constitute a *lien* upon the vessel which takes precedence of every other lien, except that of salvors who rescue a wrecked or abandoned vessel, and thus save it for the benefit of the unpaid seamen as well as of prior parties. In *suing for their wages* seamen may proceed against the vessel, freight, and master, or against the vessel and freight, or against the master or owner alone *in personam.*

READ: 3 Kent Com., Lect. xlvi, pp. 176–199;
Dunlap on Admiralty, pp. 102–113;
1 Conkling on Admiralty, pp. 107–160;
2 Conkling on Admiralty, pp. 45–69;
2 Parsons on Shipping and Admiralty, pp. 32–105, 364–368;
Cohen on Admiralty, pp. 231–241;
Desty on Shipping and Admiralty, §§ 141–195;
Benedict on Admiralty, §§ 277–284, 503–508;
Hughes on Admiralty, §§ 8–10;
Waples on Proceedings in Rem, §§ 487–501;
2 Parsons on Contracts, pp. 336–347.

§ 385. Of the Navigation of Vessels: Pilotage: Towage.

While on the open sea the master is presumed to be capable of navigating his own vessel, but when approaching land or entering harbors or rivers both prudence and the law oblige him to take on board *a pilot,* whose official license attests his familiarity with the local channels and obstructions, and his ability to guide the vessel in safety to her destination. This rule applies alike to outward and inward bound vessels; and to ensure its observance the master is required to pay the customary pilot fees even when he refuses or does not need the

service. The pilot, while on board the vessel in his official capacity, is the temporary master, and cannot be interfered with by the actual master as to the performance of his duties as pilot unless he shows himself to be reckless or incompetent. He has charge of the management of the vessel; prescribes its course and speed; fixes the place and mode of anchorage; and is liable for any accident that may happen through his negligence or want of skill. He is so far the agent of the owners that they are responsible to third parties for damages caused by the vessel while under his control. The fees of a pilot who has tendered his services to the master can be collected by a suit *in rem* against the vessel, whether or not the tender is accepted.

Rem. The navigation of vessels in harbors and rivers, in modern times, often requires the service known as *towage*. This service consists in the propulsion of the vessel by an external force along her usual course of transit, and is generally performed by other boats, called *tugs*. The reciprocal relations between the tug and tow, and the legal obligations which grow out of them, are not always the same. If the tug takes possession of the tow, and not only propels it but directs its movements, the owners of the tug are liable for any accident either to the tow or to other vessels from its careless navigation. On the other hand, if the tug is firmly attached to the tow, and while the tug furnishes the motive power both vessels are navigated from the tow by the master or pilot of the tow, responsibility for accident rests upon the owners of the tow. When the tug and tow are remotely attached by a hawser, and though the tug supplies the motive power each vessel is navigated by its own master, only that one would be responsible whose negligence resulted in the injury. The master of a tug which undertakes the navigation of a tow must know the channel and its dangers, and be qualified to conduct the tow to the proposed locality. His contract with the tow implies a *warranty* that his tug is properly equipped for the service to be rendered. The towage fees constitute a claim against the vessel, and may be collected by a suit *in rem*.

READ: 1 Conkling on Admiralty, pp. 296–310;
2 Parsons on Shipping and Admiralty, pp. 106–119;
Desty on Shipping and Admiralty, §§ 331–352;
Benedict on Admiralty, § 289;
Hughes on Admiralty, §§ 12–19, 56–61;
Waples on Proceedings in Rem, §§ 502–505;
Spencer on Marine Collisions, §§ 121–139, 162, 163;
2 Parsons on Contracts, pp. 348, 349.

§ 386. Of the Navigation of Vessels: Collisions: Signal and Sailing Rules.

A *collision* may take place between two vessels without the fault of either, or through the negligence of both, or through the wrongful conduct of one alone. Where neither vessel is in fault no liability attaches, and the loss lies where it falls. Where both vessels are in fault the loss is equally divided between them, without reference to the degrees of their respective negligence; the one which has sustained the least injury contributing to the other a sum sufficient to make the loss the same. If one vessel alone is in fault it must bear its own loss, and compensate the other for the damage it has suffered. In *estimating these damages*, if the loss is total, the amount is measured by the market value of the vessel at the time of the collision, and the net freight for the voyage; if the loss is partial, it includes the cost of saving and repairing the vessel, and the value of her use during the period which elapses while she is laid up for repairs. It is the *duty of each of the colliding vessels* to stand by and aid the other, until it is apparent that no further assistance is required; and the failure to perform this duty is *prima facie* evidence that the deserting vessel was responsible for the collision. *Damages to third parties* arising from the collision are estimated in the same manner, except that if the injury results from the fault of both colliding vessels each must pay half the loss; and if one of the vessels is of insufficient value for that purpose the amount must be made up by the other.

Rem. Mainly to prevent collisions "signal and sailing rules" are prescribed by law. The *signal rules* require the display at night of certain white and colored lights whereby the character and size of a vessel, and the direction in which it is moving, are indicated; and the production of certain sounds by horns or whistles as a warning in case of fog, or as a notice to other craft of the course to be pursued. The *sailing rules* govern the conduct of moving vessels when meeting or overtaking other vessels; obliging those which are most easily handled to keep out of the way of others and each, if of equal ability, to pass to the right in pursuance of the usual law of the road; and requiring all to do whatever else may be necessary and possible in order to avoid a collision. The sailing rules assume that the vessels can be seen or their signals heard, and when this is not the case the rules do not apply.

READ: 3 Kent Com., Lect. xlvii, pp. 230–232;
1 Conkling on Admiralty, pp. 370–426;
1 Parsons on Shipping and Admiralty, pp. 525–608;
Cohen on Admiralty, pp. 206–230;
Desty on Shipping and Admiralty, §§ 353–406;
Henry on Admiralty, §§ 74–93;
Benedict on Admiralty, § 312;
Hughes on Admiralty, §§ 118–156;
Waples on Proceedings in Rem, §§ 516–520;
Spencer on Marine Collisions, §§ 18–120, 140–381;
2 Parsons on Contracts, pp. 308–314.

§ 387. Of the Cargo and Freight: Bills of Lading: Limited Liability Acts.

The owners of a vessel may employ it in the transportation of their own merchandise, or as a *common carrier* conveying any merchandise that may be offered, or as a *private carrier* transporting goods for certain shippers only. Where the owners carry only their own merchandise no legal obligations exist between the vessel and its cargo. Where they carry the goods of others the law implies a contract that the vessel is seaworthy at the commencement of the voyage, and that it will proceed to its destination by the customary route without unnecessary delay. The merchandise becomes *cargo*, for which the owners of the vessel are responsible, when it is delivered by the shipper on board the vessel to the master, or some other person who is authorized to receive it. It must then be stowed in a suitable place and manner, usually by *expert stevedores* whose fees for the service are a lien upon the vessel. On receiving the merchandise as cargo the master should prepare and sign a *bill of lading* in triplicate, of which one copy is delivered to the shipper, one is forwarded to the consignee, and the other is retained by the master. The bill of lading sets forth the contract between the shipper and the owner of the vessel, describing the merchandise by its quantity and markings, the names of the shipper and consignee, the place of departure and discharge, the name of the master and vessel, and the price to be paid for transportation. The *indorsement of a bill of lading* to a third person transfers to him the property in the goods. Its stipulation as to carriage generally provides that the merchandise shall be delivered at the port of discharge to the consignee or his indorsee in the same condition in which it was

when received on board the vessel, the perils of the sea excepted. This contract obliges the vessel to sail as soon as she is ready for her voyage, and proceed to the port of discharge without delay, and not to deviate from the usual route without some just and constraining cause, — such as to escape a storm or pirates, or to procure necessary supplies, or to aid another vessel in distress. If the *voyage should be interrupted* by disaster, and the vessel cannot proceed within a reasonable time, the cargo must be transferred to some other competent vessel and duly forwarded; or if this be impossible the master must act as agent for the shipper in protecting, and in extreme cases in selling, the cargo on his account. Upon *reaching the port of destination* with the cargo the master must give notice of his arrival to the consignee, and offer to discharge the goods from the vessel; but if he intends to enforce against them the lien of the vessel for the freight he must not suffer the consignee to remove them until the freight is paid. In the absence of a special agreement *freight* is neither due nor earned until the voyage is completed; and if the voyage is broken up, and the cargo is not forwarded by another vessel, or accepted by the shipper or the consignee at the intermediate port reached by the vessel, no freight is payable. Acceptance of the cargo at the intermediate port entitles the vessel to freight *pro rata*.

Rem. For the safety and good condition of the cargo while in transit the vessel is liable, unless the loss or deterioration is produced by "*dangers of the sea*," — which include all unavoidable accidents in navigation, occurring without negligence on the part of the master or crew. This general responsibility is restricted in the United States by statutes known as the "*Limited Liability Acts*." Some of these statutes exempt the owners of the vessel from responsibility for losses occasioned by faults or errors in navigating or managing the vessel, or by dangers of the sea, or by acts of God or the public enemy, or by inherent defects in the merchandise or its package, or by seizure under legal process, or by the acts or omissions of the shipper or consignee, or by the efforts of the master and crew to save life or property at sea; *provided* such owners had exercised due diligence to make the vessel in all respects seaworthy, and had properly manned, equipped, and supplied her. Other statutes limit the liability of those owners, who are not privy to the wrong resulting in the loss, to the value of their interest in the

vessel, both in cases of injury to its own cargo and in cases of damage to other vessels and their cargoes by collision.

READ: 3 Kent Com., Lect. xlvii, pp. 206–230, 248–251;
Dunlap on Admiralty, pp. 106, 107;
1 Conkling on Admiralty, pp. 161–169, 187–250, 257–261;
1 Parsons on Shipping and Admiralty, pp. 170–273, 479–524, 609–647;
2 Parsons on Shipping and Admiralty, pp. 246–253;
Desty on Shipping and Admiralty, §§ 217–289;
Benedict on Admiralty, §§ 285, 286;
Hughes on Admiralty, §§ 53–55, 70–82, 90–95;
Waples on Proceedings in Rem, §§ 527–533;
2 Parsons on Contracts, pp. 285–300, 307, 308.

§ 388. Of General Average.

Among the powers vested by necessity in the master of a vessel during the voyage is that of sacrificing a portion of the property in his charge, in order to save the remainder. When this sacrifice is made by the master himself or by his authority, and is voluntary and for the benefit of all, and is necessary and results in saving the property at risk, and the emergency has not been caused by the fault of the owners of the property sacrificed, the loss is *averaged* or apportioned among all the owners of the property subjected to the common danger; and those whose property has thereby been saved must contribute their shares of the loss to the owners of the property sacrificed, in proportion to the value of the respective interests at stake, thus placing all the owners upon equal ground.

Rem. The sacrifice which calls for the application of this doctrine of general average may consist in a *jettison* of the cargo, or of the masts, boats, or other parts of the vessel; or in *beaching* the vessel itself to prevent it from sinking and losing the cargo; or in *scuttling* the vessel to extinguish a fire in the cargo; or in any other act which destroys one part of that which is exposed to the common danger for the sake of the residue.

READ: 3 Kent Com., Lect. xlvii, pp. 232–244;
1 Conkling on Admiralty, pp. 250–257;
1 Parsons on Shipping and Admiralty, pp. 338–478;
Desty on Shipping and Admiralty, §§ 290–302;
Benedict on Admiralty, §§ 295, 296;
Hughes on Admiralty, §§ 20, 21;
2 Parsons on Contracts, pp. 323–332.

§ 389. Of Salvage.

Whenever a vessel or its cargo is in a situation of distress, from which apparently it cannot be rescued by the master, crew, and passengers, any third party may intervene, with or without a contract with the master, and if he succeeds in saving any of the property he will be entitled to a proper compensation. This compensation is known as *salvage*. Its amount is determined either by agreement between the salvors and the owners; or by the court in view of the value of the property saved, the character, skill, danger, and expense of the salvors, and the proportion of the property saved to the property lost. To encourage salvage enterprise, especially in cases where life as well as property is in danger, the law is liberal to the salvor in its estimate of the amount which he has earned.

Rem. The forms of salvage service are of great variety, and of every degree of magnitude, from the towing into port of a disabled ocean steamer with her passengers and cargo to the rescue from the breakers of a single bale of merchandise. But no service rendered by the master, pilot, crew, or passengers in their ordinary lines of duty is of this character, nor does the hazard which attends their efforts give them any claim for compensation beyond their stipulated wages.

READ: 3 Kent Com., Lect. xlvii, pp. 245–248;
1 Conkling on Admiralty, pp. 344–369;
2 Parsons on Shipping and Admiralty, pp. 260–322;
Cohen on Admiralty, pp. 36–188;
Desty on Shipping and Admiralty, §§ 303–330;
Benedict on Admiralty, §§ 300–300 *e*;
Hughes on Admiralty, §§ 62–69;
Waples on Proceedings in Rem, §§ 506–514;
2 Parsons on Contracts, pp. 315–322.

§ 390. Of Marine Insurance.

Marine insurance is a contract whereby one party, in consideration of a stipulated premium, agrees to indemnify another against certain marine hazards to which his vessel, cargo, or freight are about to be exposed, either during a particular voyage or for a specified period of time. Any person can effect such an insurance who has an *insurable interest* in the property, — that is, whose relation to the property entitles him to a pecuniary benefit from its preservation or would subject him to a pecuni-

ary loss if it were injured or destroyed. The contract is customarily *in writing*, and contains such provisions as the parties may determine in reference to the property insured, the dangers insured against, and the amount to be paid in case of loss. Unless the contract expressly declares the contrary the law *implies a warranty* by the party insured that the vessel is seaworthy at the time of leaving port; that it will follow the usual route to its destination without unnecessary deviation; that if there is a choice of routes it will pursue one which is reasonable and safe; and that it will not engage in illegal traffic. There is also an implied warranty that all *representations* of material facts, made by the insured in order to obtain the insurance, are true; and that he has not concealed any fact, known to himself, which the insurer does not know but has the right to know. A breach of these implied warranties, or of any express condition essential to the contract, *avoids the policy*. The *perils of the sea* insured against are those extraordinary occurrences which arise from the action of the winds or waves, or from objects external to the vessel with which it collides. Perils from ordinary occurrences may be covered by the contract if specifically enumerated, but not otherwise. A loss occasioned by a series of causes is attributed to the last efficient cause; and if this cause is not among the perils covered by the policy the insurer is not liable, and the insured must bear the loss. A *total loss* is one in which the insured property is entirely destroyed; or is so cast away or injured as to be of no value either to the insured or the insurer; or where the property has sustained such damage that the insured has a right to abandon it to the insurer and collect from him the same indemnity as if it had been totally destroyed. The total loss of certain separable articles is not a total but a *partial loss* of the vessel or cargo considered as a whole. The *amount of insurance* to be paid in case of total loss is measured by the value of the property. In what is called a *valued policy* this amount is fixed by stipulation in the policy itself; in an *open policy* it is left to be ascertained by inquiry when the loss occurs. In a case of partial loss the amount payable is such a fraction of the amount insured as the value of the property destroyed or abandoned bears to the value of the property in-

sured. In a loss occasioned by the fault of third parties an insurer paying the insurance is *subrogated* to whatever rights of action the insured may have possessed against the persons who have caused the injury.

Rem. In reference to a vessel the *right of abandonment* exists if the cost of saving and repairing the vessel would exceed one-half of its value when repaired; in reference to the cargo it arises when the cargo, though still existing, is in such a state that it cannot be forwarded, or where no means of forwarding it are available and no reasonable market for it is at hand, or where its value is so far diminished that under all the circumstances it is worthless to its owner. The property when abandoned to the insurer, and accepted by him, becomes his property, to be disposed of as he pleases; and he in turn is liable to the insured for the amount of the insurance as if the property had been actually destroyed.

READ: 3 Kent Com., Lect. xlviii, pp. 253–352;
Benedict on Admiralty, § 294;
Hughes on Admiralty, §§ 22–41;
2 Parsons on Contracts, pp. 350–416.

§ 391. Of Marine Torts and Crimes.

Since a *marine tort* derives its maritime character entirely from the locality in which it is committed it is not necessarily connected either with commerce or navigation. Even those which are perpetrated on board vessels are often mere personal injuries, differing in no respect from similar injuries committed upon the land. Assaults by the master upon the seamen; negligence toward servants or strangers; damage to property within or outside the vessel; abduction of unwilling passengers, — are all instances of such wrongs, and are actionable equally in the common law and admiralty courts.

Rem. *Crimes* committed upon navigable waters were held in England to be within the jurisdiction of the admiralty. This doctrine has been advocated in the United States, but our courts of admiralty do not exercise such jurisdiction unless it is conferred upon them by specific statutes.

READ: Dunlap on Admiralty, pp. 281–288;
1 Conkling on Admiralty, pp. 427–460;
2 Parsons on Shipping and Admiralty, pp. 347–351;
Cohen on Admiralty, p. 265;

Henry on Admiralty, §§ 26–37;
Benedict on Admiralty, §§ 308–311, 600–603;
Hughes on Admiralty, §§ 96–117;
Waples on Proceedings in Rem, §§ 521–526;
Spencer on Marine Collisions, §§ 14–17.

§ 392. Of Admiralty Jurisdiction over Cases of Prize and Seizure.

In this country the courts of admiralty have exclusive jurisdiction over cases of prize and seizure. *Prize* includes all vessels and other personal property which is taken out of the hands of the enemy by the right of war, either on the high seas or in foreign ports or harbors, or on land by the naval forces when acting alone or in conjunction with the land forces. The property thus captured does not, however, vest in the captors until their title to it has been examined and established by a court of admiralty. It is the *duty of the captors* to bring the property into port, and there notify the court, or the board of prize commissioners which is appointed for that purpose in time of war, of the presence of the prize and the place of its detention. Thereupon the commissioners or the court examine the property and provide for its temporary safety or, when perishable, for its sale and the custody of its proceeds, and institute a preliminary inquiry into the legality of the capture by propounding to the persons taken with the property, or now claiming it against the captors, certain standing interrogatories as to their relation to the prize, its condition, and the circumstances of its capture. The answers to these interrogatories are returned, with the ship's papers and other documents, to the clerk of the court. Regular proceedings in admiralty for the condemnation of the property may then be commenced by libel, followed by the answer, hearing, and decree. If the property is condemned it is sold, and the proceeds are given to the captors either in whole or in part; in whole, when they wrested the prize from a superior or equal force; in part, when taken from a force inferior to their own; the residue being appropriated by the United States. A decree that the capture was unlawful restores the property to the former owners, with a right of action for damages against the captors.

Rem. Seizures of property for violations of the *revenue laws*, or for engaging in illicit trade or for other offences, when the

seizure is made in navigable waters, also give rise to proceedings in admiralty. The guilty property is *ipso facto* forfeited to the United States, but its guilt must be first established in a suit in admiralty brought by the officer in charge in the name of the United States, giving the owners of the property an opportunity to be heard in its defence. When the guilty property is seized on board a vessel, the vessel also may be forfeited if its master or owners were accomplices in the offence.

READ: 2 Parsons on Shipping and Admiralty, pp. 218–222, 253–259, 458–478;
Etting on Admiralty Jurisdiction, pp. 75–82;
Desty on Shipping and Admiralty, §§ 407–448;
Benedict on Admiralty, §§ 301–307, 509–512 *f*;
Waples on Proceedings in Rem, §§ 140–454, 534–541.

§ 393. Of Actions in Rem and Actions in Personam.

Actions in admiralty are either actions *in rem* alone, or actions *in personam* alone, or actions both *in personam* and *in rem*. An *action in rem* is an action brought directly against the vessel, cargo, or other property in reference to which the right of action is asserted; making the *property itself* the actual and nominal defendant irrespective of its ownership or possession, and seeking redress by its seizure, sale, and the application of its proceeds in compensation for the alleged claim or injury. This form of action lies whenever the plaintiff has a maritime lien upon the property, — as for seaman's wages, repairs, supplies of material-men, bottomry, respondentia, pilotage, towage, freight, salvage, or damages caused by a collision. An *action in personam* is an action against a personal defendant on account of some contract obligation or claim for damages on which he is personally liable. This form of action lies in all admiralty cases except those in which the vessel, cargo, or other property is made by law or contract solely responsible for the claim of the plaintiff, — as in bottomry or respondentia loans bearing maritime interest. An action both *in rem* and *in personam* may be brought where there is a maritime lien upon the property, and at the same time a contract obligation or a claim for damages against its owner or possessor, — as in cases of seaman's wages, pilotage, towage, and collision.

Rem. The procedure in admiralty is even more direct and simple than that in equity. The admiralty courts have no pre-

scribed terms and vacations, but are always open and ready to take immediate cognizance of any case that may arise. The entire course of proceedings is of a practical business character, unincumbered by technicalities or arbitrary forms, and evidently intended to adjust the rights of all parties in the most available manner, and with the least preventable delay. The prompt, decisive, energetic action of these courts harmonizes well with the avocation whose affairs they administer, and adapts the relief they offer to the emergencies by which they are constantly confronted.

READ: Dunlap on Admiralty, pp. 85–94;
2 Conkling on Admiralty, pp. 1–19;
2 Parsons on Shipping and Admiralty, pp. 344–346, 355–360, 368, 369;
Henry on Admiralty, §§ 14, 15, 107, 132–136;
Benedict on Admiralty, §§ 314–362;
Hughes on Admiralty, §§ 189–191;
Waples on Proceedings in Rem, §§ 1–41.

§ 394. Of the Parties to Actions in Admiralty.

The proper parties to an action in admiralty are determined by the nature of the controversy and the form of action. The plaintiffs, or *libellants* as they are called, are those persons whose rights the suit is intended to enforce, or whose wrongs it is instituted to redress. The defendant, called also the *respondent* or *libelee*, is in an action *in rem* the property itself, and it is not necessary to name any person as defendant. In actions *in personam* the individuals against whom the plaintiff makes his claim must be defendants, — as in suits in equity and common law. The *joinder* of different *causes of action* in the same suit is permitted, unless disastrous confusion would result.

Rem. In order to avoid a *multiplicity of suits* in cases where several parties have distinct but similar claims, and are entitled to the same relief, they may be joined as libellants; and on this ground the master may often sue on behalf of several owners of the ship and cargo, or of the collective crew. When, as the suit progresses, it becomes apparent that *additional parties* must be present in order to a complete settlement of the points in controversy, they may be cited in to appear; and where third persons have sustained an injury from the misconduct of several others, and suit has been commenced against but one, the rest may be made parties, and damages may be assessed against all who are found liable.

READ: Dunlap on Admiralty, pp. 94–101;
2 Conkling on Admiralty, pp. 22–44;
2 Parsons on Shipping and Admiralty, pp. 223–230, 370–378;
Cohen on Admiralty, pp. 246–254;
Henry on Admiralty, §§ 108, 118, 119;
Benedict on Admiralty, §§ 363, 364, 380–399.

§ 395. Of the Libel.

Admiralty proceedings are *commenced* by the filing of the libel or complaint in the office of the clerk of that maritime court out of which the process is to issue. The *libel* must be in writing; must begin with the title of the court; and must be addressed to the judge. It must then state the nature of the cause of action and allege it to be a cause civil and maritime; a cause of contract, or of tort and damage, or of salvage, or of possession, or whatever else the case may be. If the action is *in rem* the libel must also aver that the property is now within the territorial jurisdiction of the court; and if the action is *in personam* it must set forth the names and occupations and places of residence of the parties. Having done this, the libel must *propound in distinct articles* the various facts upon which the libellant relies to sustain his claims, so that the defendant may be able to answer distinctly and separately to the several matters contained in each article; and must conclude with a prayer for due process to enforce his rights *in rem* or *in personam* as the case requires, and for such other relief as the court is able to give in the premises. The libellant may also call upon the defendant, in the conclusion of his libel, to answer on oath to certain interrogatories, concerning the matters alleged in the libel, which he then propounds. The libel must be signed and verified by the oath of the libellant; and unless he sues *in forma pauperis* it must be accompanied by a stipulation with sureties for the payment of costs in case of an adverse decree.

Rem. Libels in *prize and seizure* causes, in lieu of corresponding statements in the libel above described, must allege the place of capture and the present location of the property, and pray for process to issue to give notice to all interested parties to appear at a day named, and show cause why the forfeiture should not be decreed. *Defects of form* in a libel may be amended at any time on motion to the court, as a matter of course. *De-*

fects of substance may be amended, or new matter may be added, at any time before final decree, upon such terms as the court may impose.

READ: Dunlap on Admiralty, pp. 111–131;
2 Conkling on Admiralty, pp. 70–79;
2 Parsons on Shipping and Admiralty, pp. 379–387;
Benedict on Admiralty, §§ 366, 372–379, 401–416;
Hughes on Admiralty, §§ 192, 193;
Waples on Proceedings in Rem, §§ 55–63.

§ 396. Of the Process in Admiralty.

In *actions in rem* the process must issue from the court within whose territorial jurisdiction the *res* is then located. This *process* is a warrant of arrest, signed by the clerk under the seal of the court, directed to the marshal, and instructing him to seize the vessel, cargo, or other property to be arrested and give notice to all persons in interest that on a certain day the matter will be heard by the court at a certain place, when and where they may appear, if they will, and interpose their claims. This *warrant is served* by the marshal by taking the property into his possession, posting one notice of his doings and the citation to the interested parties on the court-room door, attaching another notice to the property, and publishing a third in such newspaper as the court directs; placing the property in the meantime in the hands of a keeper. Where the property is perishable the court, on the application of either party, may *order its sale*, or its delivery to the claimant on his deposit of its estimated value, or its release upon an adequate security. When *property incidental* to the property seized is in the possession of third persons, under an apparent right, a *monition* may be issued to them by the court commanding them to show cause why it should not be delivered to the marshal, and upon the hearing the court may make such order as law and justice may require. In *actions in personam* the process may issue from any court which has jurisdiction over the person of the defendant, and may be a monition or summons to the defendant to appear and answer, on a simple warrant of arrest against his person, or a warrant of arrest coupled with a clause providing that if the defendant cannot be found his goods and chattels or, if these are wanting, his credits and effects shall be attached.

This process is served according to its precept in the same manner as in suits at common law.

Rem. When a defendant is arrested on admiralty process he may be *enlarged on bail*, conditioned that he will appear and abide the orders and decrees of the court. When property is attached it may be released upon the substitution of a *bond* with similar conditions. If effects and credits are concealed in the hands of a *garnishee*, he may be cited in to disclose on oath; and if he admits the claim he will be held responsible for the property by the court. These bonds and stipulations are under the continual control of the court, and may be reduced or increased by it as the exigencies of the case demand. In actions *in personam*, involving an amount of not more than five hundred dollars, no warrant for the arrest of the defendant or for the attachment of his property can issue without the special order of the court; and when the State in which the court is held has abolished imprisonment in certain civil cases, no arrest can be made in similar cases in the admiralty courts.

READ: Dunlap on Admiralty, pp. 132–178;
2 Conkling on Admiralty, pp. 80–172;
2 Parsons on Shipping and Admiralty, pp. 388–399, 406–419;
Cohen on Admiralty, pp. 262–265;
Henry on Admiralty, §§ 115, 116, 121–129;
Benedict on Admiralty, §§ 417–448;
Hughes on Admiralty, §§ 194, 199;
Waples on Proceedings in Rem, §§ 42–54, 64–72.

§ 397. Of the Appearance of Parties and Intervenors.

The *libellant must appear* on the return day to prosecute his suit, or it may be adjudged against him on default, and dismissed with costs. If the libellant appears and the defendant makes default, or if the defendant appears and fails to answer, or if in a suit *in rem* no claimant of the property intervenes, the libel may be taken *pro confesso*, and the cause will then be heard *ex parte* and be decided as the court deems just upon the testimony offered by the libellant. When the defendant is defaulted the court may open the default, for just reasons, at any time within a prescribed period after the decree against him has been entered. Upon the appearance of the defendant in an action *in personam* the court may require him to give a stipulation, with sureties, to pay whatever costs and expenses may be adjudged against him in the suit, unless bail has been already taken or property has been attached.

Rem. In actions *in rem*, any person who has an interest in the property seized may *intervene*, and appear to be heard for his own protection. In making his appearance he must file a petition setting forth his interest in suitable allegations, and give a stipulation, with sureties, to abide the final decree in the cause, and pay whatever damages and costs may be awarded against him. To these allegations the other parties to the suit may be compelled to make due answer, and thereupon such further proceedings will be had as the issues created by these pleadings may require. If the intervenor asserts himself to be the owner of the property, or the agent of the owner making the claim on his behalf, he must verify the assertion by oath or affirmation. The same right to intervene exists where the property seized has been sold, and the proceeds of the sale have been paid into the registry of the court for distribution among the claimants as their interests may appear.

READ: 1 Conkling on Admiralty, pp. 48–72;
2 Conkling on Admiralty, pp. 173–211;
2 Parsons on Shipping and Admiralty, pp. 400–406;
Cohen on Admiralty, pp. 254–257;
Henry on Admiralty, § 120;
Benedict on Admiralty, §§ 365, 449–460, 489–502;
Waples on Proceedings in Rem, §§ 73–77, 82–89.

§ 398. Of the Pleadings in Admiralty.

The pleadings in admiralty, subsequent to the libel, proceed from the defendant, and consist either in objections to the legal form or substance of the libel, or in a denial or a confession and avoidance of its allegations of fact. Objections to the legal sufficiency of the libel are made by *exceptions*, which correspond to a demurrer at common law, and which, if sustained, result in the amendment of the libel when it can be amended, upon such terms as the court may impose. A denial or a confession and avoidance of the allegations of the libel is made by an *answer* upon oath or affirmation, in which the defendant must reply fully and explicitly to the separate articles of the libel in the same order in which they are set forth in the libel itself; and so far as he is able he must also respond in the same manner to any interrogatories which the libel may contain. If the answer is not full and explicit, in reference to all the allegations of the bill, it may be excepted to by the libellant, and the defendant may then be compelled by an attachment to make further answer, or the matter excepted to may

be decreed *pro confesso* against him. This rule does not, however, oblige a defendant to disclose under oath any facts which would subject him to a prosecution, penalty, or forfeiture for any criminal offence. The defendant in his answer may set up *new matter in defence*, and in aid thereof may propound interrogatories to the libellant, requiring him to reply to them under oath, or in default of such reply to submit to the dismissal of his libel or to the decision of the subject-matter of the interrogatory in favor of the defendant. Where the defendant has a *counter-claim*, arising out of the same cause of action for which the original libel was filed, he may present it in a *cross-libel*, to which the libellant must answer as if he were himself a defendant, and give the same security for damages and costs as if the action had been separately brought.

Rem. In admiralty proceedings there is no replication, general or special, except in some peculiar cases, and then only by permission of the court. The allegations of the answer are met by amending the libel so far as may be necessary to put all the facts in issue; and if this amendment of the libel introduces additional new matter an amendment of the answer may be made to meet it.

READ: Dunlap on Admiralty, pp. 179–196;
2 Conkling on Admiralty, pp. 20–22, 212–269, 441–443;
2 Parsons on Shipping and Admiralty, pp. 361–363, 420–434, 484–486;
Cohen on Admiralty, pp. 257–262;
Henry on Admiralty, § 109;
Benedict on Admiralty, §§ 367–371, 461–488, 593–599, 604–606 *a*;
Hughes on Admiralty, §§ 195, 196, 200–202;
Waples on Proceedings in Rem, §§ 78–81.

§ 399. Of the Trial, Judgment, and Decree.

When the pleadings are closed the case is assigned for *trial* at the convenience of the parties and the court. The trial is conducted by the judge alone without a jury, and the evidence is presented either orally, or by depositions, or in the report of a commissioner by whom the testimony has been heard in pursuance of an order of the court. If the decision is in favor of the libellant, and the amount of damages to be awarded requires further computation, the matter is referred to a commissioner who makes the necessary investigation and returns

his finding to the court; where it may be excepted to by either party and recommitted for correction, or be adopted by the judge and made the basis of his decree. In actions *in personam* a decree for the libellant awards to him the damages arising from the tort or breach of contract of which he complains, with or without costs as the court may determine in view of his fairness and good faith in the institution of the suit. In actions *in rem* a decree for the libellant determines the character and value of his rights in the property seized, and if the property is still in the possession of the court orders it to be advertised and sold, and payment to be made. A decree in favor of the defendant, in either form of action, dismisses the libel and awards him costs at the discretion of the court.

Rem. An *appeal* from a decree in admiralty, in the District Court of the United States, lies to the Circuit Court of Appeals upon the petition of the defeated party. This petition is filed in the District Court; is addressed to the judges of the appellate court; assigns the errors complained of; and prays for the allowance of an appeal. The appeal being allowed by the judge, a citation issues to the adverse party directing him to appear at a day named in the appellate court, and answer to the appeal. The clerk of the District Court thereupon transmits to the clerk of the appellate court a certified copy of the entire record of the case in the lower court; which copy being filed and entered on the docket of the higher court brings the case within its jurisdiction. Upon the hearing on the appeal new evidence may be introduced by permission of the court, and when the hearing is concluded the case is remanded by the appellate court to the lower court, with instructions as to the character of the final decree. In cases where the appellate court desires the advice of the Supreme Court of the United States, upon any question, it may certify the question to that tribunal for a decision; or the Supreme Court itself, in cases which it deems sufficiently important, may bring the cause before it for review by a *writ of certiorari*.

READ: Dunlap on Admiralty, pp. 197–280;
2 Conkling on Admiralty, pp. 270–429;
2 Parsons on Shipping and Admiralty, pp. 204–217, 435–457, 479–483, 487–493;
Cohen on Admiralty, p. 266;
Henry on Admiralty, §§ 113, 130, 131, 137–162;
Benedict on Admiralty, §§ 513–554;
Hughes on Admiralty, §§ 197, 198, 206–209;
Waples on Proceedings in Rem, §§ 90–120.

§ 400. Of the Enforcement and Conclusiveness of Decrees in Admiralty.

A decree in admiralty in an action *in personam*, when in favor of the libellant, is enforced by an execution in the nature of a *fieri facias*, commanding the marshal to levy on the goods and chattels, or the lands and tenements, of the defendant to satisfy the claim. In enforcing a decree in favor of the libellant in an action *in rem* the marshal sells the property seized and collects the proceeds and deposits them in the registry of the court, from whence they are paid out to the parties entitled to receive them. If the property has been released before decree upon a stipulation, the decree will run against the parties to the stipulation, and is enforced by a writ of *fieri facias*. If the property has been already sold, the decree apportions the proceeds in the registry. The final decree of an admiralty court in an action *in personam* is binding upon the parties to the action and their privies, in reference to the question raised and decided in the suit, in the same manner as are judgments at common law or equity. Admiralty courts, being tribunals acting under the law of nations, their existence and seals are matters of judicial notice in all foreign courts, and their records cannot be attacked except for fraud or want of jurisdiction. A final decree in an action *in rem* therefore prevails, so far as the liability of the property arrested is concerned, against all the world. The arrest gives constructive notice to all persons interested to appear and be heard, wherever they may be; and though they are not thereby made defendants, but remain merely claimants with a right to intervene, a decree against the property subjects their interests in it finally and absolutely to the order of the court. Hence a sale of the property in pursuance of such decree devests the interests not only of those who did appear, but of all who had a right to appear, and as against them creates an indefeasable title in the purchaser. A *decree in rem*, however, is not a judgment against the persons or the other property of the claimants, nor does it impose even upon those who appear any liability beyond their interest in the arrested property and that assumed by them in their respective stipulations.

Rem. Under the *"Limited Liability Acts"* the amount of damages recoverable in certain cases is restricted to the value

of the property through whose instrumentality the injury is caused. Thus the owner of a vessel against whom any claim is made for the loss of property shipped on board his vessel, or for damage caused by a collision or other accident without his privity or knowledge, may take advantage of these Acts either in his answer to a libel already filed, or by petition against the claimant before any action is commenced, by stating the facts which bring him within the exemptions of the Statutes and praying for the prescribed relief. By order of the court an appraisal is then made of his interest in the guilty vessel, and upon his payment of its value into the registry, or the transfer of his interest to a trustee for the benefit of all concerned, a mandate issues restraining the claimants from pursuing any other remedy in respect to these claims, and directing them to make proof of such claims before a designated commissioner within a certain time. Any claimant, whose claim is thus presented to the commissioner under oath, may defend against the allegations of the answer or the prayer of the petition. If the petition is sustained the claims allowed by the commissioner receive a *pro rata* dividend from the sum paid into the registry, or from the proceeds of the sale made by the trustee, subject to the rules determining the priority of claims; and the owner is thenceforth secure from action on the claims either in the common law or the admiralty courts.

READ: 2 Conkling on Admiralty, pp. 430–440;
1 Parsons on Shipping and Admiralty, pp. 74–78;
2 Parsons on Shipping and Admiralty, pp. 120–140, 231–235, 338–343, 494, 495;
Henry on Admiralty, §§ 94–106, 111, 112;
Benedict on Admiralty, §§ 585–592;
Hughes on Admiralty, §§ 160–174, 203–205;
Waples on Proceedings in Rem, §§ 121–139;
Spencer on Marine Collisions, §§ 187–234.

SECTION VII

OF THE COURTS OF PROBATE

§ 401. Of the Origin and Purpose of Courts of Probate.

Courts of probate are tribunals clothed with special powers, particularly with reference to the settlement of estates of deceased persons. In England these courts were originally ecclesiastical tribunals, presided over by the ordinary or bishop of the diocese. In this country they are *statutory courts*, and generally discharge the functions of courts of equity, courts

of common law, and ecclesiastical courts, concerning matters within their jurisdiction. In their procedure they observe the usages and customs which experience has shown to be the most convenient. They are known in different States as "*orphan's courts*"; "*registers' courts*"; "*surrogates' courts*," etc.; and in their details are controlled by local law.

Rem. From the Norman Conquest until the passage of the Statute of Wills (A. D. 1541), legal estates of inheritance in lands were with few exceptions undevisable, but descended to the heirs designated by the feudal law. The owner of personal property, however, could dispose of the whole or a part thereof by will, and if he failed to do this it vested in the king who gave it to the ordinary for pious uses. By the Statute of Westminster the Second (A. D. 1285) the ordinary was directed to pay the debts of the deceased out of the funds thus transferred to him; and by the Act 31 Edw. III (A. D. 1358) he was further ordered to appoint the next of kin of the deceased as administrator of the estate, to act under his supervision. Later statutes provided that the surplus remaining after the debts were paid should be delivered to the heirs or other representatives of the deceased. All these proceedings were conducted in the court presided over by the ordinary, which thus obtained jurisdiction over the settlement of intestate personal estates. The necessity of determining whether or not a will of the personalty had been made by the deceased, in order to ascertain what right the ordinary might have to the estate, naturally drew after it the general cognizance of testate personal property; and when wills of real property were authorized in A. D. 1541 jurisdiction over these also was necessarily exercised by the same tribunals. This condition of affairs continued in England until A. D. 1857, when Parliament created a secular court, on which authority over all probate matters was conferred.

READ: Rice on American Probate Law, pp. 1–21, 25–28;
Croswell on Executors and Administrators, §§ 1–11;
Woerner on American Administration Law, §§ 137–144;
Schouler on Executors and Administrators, §§ 10–20;
Thornton on Lost Wills, §§ 1–16;
Bolles, Important English Statutes, p. 15, *Stat. Westminster the Second, requiring the Ordinary to pay Debts;* p. 21, *Act Edw. III, requiring appointment of Administrators;* p. 91, *Statute of Distributions;* p. 131, *Thelluson's Act, against Accumulations.*

§ 402. Of Probate Jurisdiction over Testate Estates.

A *testate estate* is one of which the former owner, now deceased, has made a final disposition by a valid will. Any

instrument of a testamentary character, whatever be its form, is for probate purposes a valid will if it complies with the requirements of the law concerning the capacity of the testator and its mode of execution. The title of the legatees and devisees to the property rests on the will, but cannot be secure against the claims of heirs and creditors unless the estate is duly settled by a court of probate. To such a court the will must be presented by the executor or other person in whose custody it may be, and if the presentation is not made within due time any interested party may apply to the court for a citation against the supposed possessor of the will, ordering him to appear and offer it for probate; and this order may be enforced when necessary by an attachment for contempt. After the will is admitted to probate the executor proceeds to settle the estate according to its directions. If the will is denied probate an administrator is appointed, and the estate is settled as an intestate estate. The court of probate before which the primary *probate* of a will must be made is that within whose territorial jurisdiction the testator had his domicile at the time of his death, though an *auxiliary probate* may be made wherever the local law of the place in which any of the property belonging to the estate is situated may require it. From a decree of probate admitting or rejecting a will an appeal generally lies to some superior tribunal.

Rem. A will may be probated either in the common or the solemn form. A *probate in common form* is usually adopted where the will is undisputed; and consists in the verification of the will by one or more of the subscribing witnesses, after such notice to the parties as the law or the discretion of the court requires. A *probate in solemn form* is made where the will is contested; and involves a trial to which all parties in interest are summoned and all the subscribing witnesses are brought by the proponent of the will, if possible, or their absence is satisfactorily accounted for, and their signatures proved by secondary evidence.

READ: 2 Bl. Com., p. 508;
3 Redfield on Wills, pp. 3–18, 36–56, 65, 126–128;
Rice on American Probate Law, pp. 36–40, 50–88, 137, 248–314;
Croswell on Executors and Administrators, § 70;
Croswell's Handbook on Executors and Administrators, §§ 4, 5;
Woerner on American Administration Law, §§ 7–11, 199–202, 214–228;

Schouler on Executors and Administrators, §§ 1–9, 53–89 *a*;
Page on Wills, §§ 312–317, 320–339, 347–358, 428–455;
2 Greenleaf on Evidence, §§ 666–695;
Thornton on Lost Wills, §§ 17–130.

§ 403. Of Probate Jurisdiction over Intestate Estates.

In an *intestate estate* lands held in fee descend to the heirs at law immediately upon the death of the former owner, while the personal property devolves upon the distributees designated by the statutes of the State, subject to the rights of creditors. Where there are no creditors, and no transfer of record is necessary to perfect their title, the distributees may divide the personal property, and the heirs the real, among themselves without the aid of a court of probate; but such private settlements are never final except against the parties by whom they are made. Hence in all cases of intestate estates settlement by a court of probate is advisable, as in most of them it is indispensable. The *primary jurisdiction* over intestate estates resides in that court of probate within whose district the intestate was domiciled at the time of his death; and to this court any distributee, creditor, or other interested party may apply for the appointment of an administrator. The *application*, if required by the local law to be in writing, should set forth the name and domicile of the decedent, his death intestate, his ownership of the estate and the interest of the applicant, and pray that letters of administration may issue to himself or to some other proper person. After due notice to all other persons who have a right to be heard an administrator is appointed, and clothed with due authority to settle the estate.

Rem. The grant of administration upon the intestate estate of a person supposed to be dead, but actually living, is in most States wholly void. Administration upon a testate estate, where no will has yet been discovered, is effectual until the will is found and probated, but is then vacated except as to past acts of the administrator which it would also have been the duty of the executor to perform. An unlawful appointment may be revoked by the court at any time for cause shown.

READ: 3 Redfield on Wills, pp. 19–35;
Rice on American Probate Law, pp. 21–25, 28–35;
Croswell on Executors and Administrators, §§ 26, 35–70;

Croswell's Handbook on Executors and Administrators, §§ 6–9, 11, 14–17;
Woerner on American Administration Law, §§ 150–156, 204–213;
Schouler on Executors and Administrators, §§ 1 *a*, 21–29 *a*.

§ 404. Of Executors and Administrators.

The *executor* named in the will must be recognized by the court as such, if he is a suitable person. He is not, however, obliged to accept the office nor to retain it if he does accept, but may appear and present the will, and then decline further service. In such a case, unless the will provides for his successor, an administrator must be appointed by the court. Administrators are of seven classes: (1) *Ordinary administrators*, appointed at the outset to settle intestate estates; (2) *Administrators cum testamento annexo*, appointed to settle testate estates upon the declination, resignation, removal, or death of an executor; (3) *Administrators de bonis non*, appointed to complete the settlement of an estate already partly administered; (4) *Administrators ad colligendum*, appointed to collect and hold the assets of the estate, like a receiver, where delay in commencing regular probate proceedings is inevitable; (5) *Administrators durante minoritate*, appointed to act until the rightful executor or administrator becomes of age; (6) *Administrators durante absentia*, appointed to act during the absence from the country of the executor or rightful administrator; (7) *Administrators pendente lite*, appointed to act pending an appeal from a decree of probate rejecting a will. Every administrator, before entering on his duties, must give a *bond* with surety for their faithful performance; and the same rule applies to an executor unless he is exempted by the will, and even then if in the judgment of the court the interests of creditors require such protection.

Rem. In selecting administrators the law generally obliges the court to prefer the *next of kin* to the deceased; and, among these, males rather than females, the elder rather than the younger, and persons experienced in business matters to persons without experience. A surviving wife usually has the right to administer upon the estate of her deceased husband, and the husband upon that of his deceased wife. If no suitable person can be found among the next of kin, a creditor or an indifferent

person may be chosen. In some States an officer, known as the *public administrator*, is provided by the local law to act in cases where no proper next of kin or creditor exists.

READ: 2 Bl. Com., pp. 503–506;
2 Kent Com., Lect. xxxvii, pp. 408–414;
Walker, American Law, §§ 126–128;
Metcalf on Contracts, pp. 161–177;
3 Redfield on Wills, pp. 66–114, 222–225, 240–243;
Rice on American Probate Law, pp. 88–97, 315–339, 345–350;
Croswell on Executors and Administrators, §§ 71–249, 260–309, 581–592, 724–734;
Croswell's Handbook on Executors and Administrators, §§ 1, 2, 18–55, 57–64, 78–90, 181–184;
Woerner on American Administration Law, §§ 170–198, 229–260;
Schouler on Executors and Administrators, §§ 30–52, 90–149, 184–197 *a*.

§ 405. Of the Settlement of Decedents' Estates.

Subject to the provisions of the will, when one exists, the duties of executors and administrators are substantially the same. The first step is the collection, inventory, and appraisal of the property belonging to the estate. For the purpose of *collecting the assets* the administrator may sue at law or equity, sell the personal property, and compromise doubtful claims. In the *inventory* he must enumerate all the articles of property belonging to the estate according to his best information; mistakes therein being corrected by future subtractions or additions. In the *appraisal* he is usually assisted by disinterested appraisers appointed by the court, whose estimate is accepted as the *prima facie* value of the property for guidance in the residue of the proceedings. Upon the filing of the inventory and appraisal in the court, if it is apparent that the assets are amply sufficient to pay all the debts and charges the estate is settled as a solvent estate. If it is doubtful whether the estate is solvent, or if there is a large number of disputed claims against it, the administrator may disclose the condition of the estate to the court, and take an order for its settlement as an insolvent estate. In *settling a solvent estate* the administrator first gives notice to the creditors to present their claims within a limited time, and those not thus presented are barred from sharing in the estate. The claims approved by the administrator may be paid at any time by him, and when the limited period has expired he sub-

mits to the court an account of his receipts, expenditures, and liabilities, and prays for an order to liquidate the remaining claims and distribute the surplus of the estate to those who are legally entitled to it. Upon the correctness of this account all parties in interest have a right to be heard, and it may be accepted, rejected, or amended as the facts may warrant. If the account is accepted the order prayed for is granted, the recognized claims are paid, and the residue is distributed. Creditors whose claims are disallowed by the account may then sue the estate, which they are not usually allowed to do during the investigations of the administrator. In *settling an insolvent estate* commissioners are first appointed by the court to receive and pass upon the claims, and creditors are notified to present their claims to them, duly verified, within a prescribed time. These commissioners sit as a court adjudicating between the claimants and all other persons interested in the estate; and their decisions expressed in their report to the court are binding on all parties, and unless appealed from are final. When the report of the commissioners is perfected and accepted by the court a dividend of the estate *pro rata* among the claimants is ordered, according to their legal priority; the expenses of the last illness and funeral of the deceased, and debts due the State ordinarily taking the precedence, and other debts being preferred or not as determined by the local law. When this order has been complied with the administrator files his final account, and the estate is closed.

Rem. Intercurrently with the regular proceedings above described the circumstances of particular estates require proceedings of a special character. Thus where a widow has an *election* between her dower and some provision made in lieu thereof, she must exercise it with the sanction of the court when the inventory is filed, in order that the administrator may know what assets will remain to meet the claims of creditors. Where a dependent *family must be supported* during the settlement of the estate, an allowance for that purpose must be made by the court as soon as the amount of the estate, and the probable claims against it, can be ascertained. Where the personal property is not sufficient to pay debts and expenses, the court may order a *sale of the realty* to such an amount as will make up the deficiency. Where personal property is situated in another

State, in which also creditors of the estate reside, the administrator must apply to the probate court in that locality for *ancillary administration*, and having there settled that portion of the estate, as to the local creditors, remove the balance to the primary probate district for final distribution. Where a probated will disposes of real property in another State, an *ancillary probate* in that State is necessary to perfect the title of the devisees upon the record, and give constructive notice of their ownership. Pending the settlement of the estate, whatever other acts may be required for its protection the administrator must faithfully perform under the supervision of the court; and for any loss arising from his neglect, unless he makes it good in his final account, he will be liable upon his bond. His *disobedience to the orders of the court* may be punished by proceedings in contempt, and in extreme cases by his removal from his office and the appointment of a new administrator.

READ: 2 Bl. Com., pp. 507–520;
2 Kent Com., Lect. xxxvii, pp. 414–436;
3 Redfield on Wills, pp. 129–221, 226–239, 243–320, 350–433;
Rice on American Probate Law, pp. 340–344, 351–446;
Croswell on Executors and Administrators, §§ 310–580, 593–723, 735–751;
Croswell's Handbook on Executors and Administrators, §§ 65–77, 91–180, 185–229;
Woerner on American Administration Law, §§ 77–130, 157–169, 275–579;
Schouler on Executors and Administrators, §§ 162–183, 198–547;
Page on Wills, §§ 710–737, 747–805;
2 Greenleaf on Evidence, §§ 338–361;
Perley's Mortuary Law, pp. 1–7, 59–99.

§ 406. Of the Settlement of the Estates of Insolvent Debtors.

A *bankrupt or insolvent* is a person who is unable to pay his debts as they fall due in the usual course of business. His assets may exceed his liabilities, but if he cannot realize upon them so as to maintain himself in good standing in his trade he is insolvent in a legal sense, and is entitled to the protection and relief afforded by bankruptcy proceedings. Proceedings in insolvency, so far as the bankrupt himself is concerned, are either voluntary or involuntary. In *voluntary insolvency* the debtor himself institutes the proceedings by a petition to the court that he be declared insolvent, and that an assignee be appointed to settle his estate. In *involuntary insolvency* the proceedings are commenced by the creditors upon the commission of an act of bankruptcy by the debtor, — such as his

failure to honor his commercial paper, his fraudulent concealment of his property, his flight to escape legal process, or his transfer of his estate for the benefit of creditors. In voluntary insolvency the *assignee* may be selected by the bankrupt; in involuntary insolvency he is designated by the court; but in either case he must receive the court's approval and be duly qualified before he can act. The debtor is then required to file a complete schedule of his assets and liabilities in detail, and give whatever other information may be useful to the assignee. Commissioners are appointed to receive and adjudicate upon the claims, and notices to present them within a certain time are given to all known creditors; the claims not so presented being entitled to no dividend from the estate. When the time thus prescribed has elapsed the commissioners report to the court their finding as to each claim presented, which may be excepted to, appealed from, or confirmed, and when confirmed binds all parties both as to the allowance and disallowance of the respective claims. An order is then made for the payment of a *dividend pro rata* on the claims allowed according to their legal priority, and subject to all perfected liens; and if this payment does not exhaust the assets similar dividends may be ordered until the debts are paid or the assets are consumed. The assignee may then render his *final account*, whose acceptance by the court releases him from further duties, and the debtor may thereupon apply for his discharge, to which he is entitled if he has complied with all the requirements of the law. During these proceedings the debtor is exempted from arrest on civil process in reference to any claim that could be proved against his estate, and from suit on any claim that has been actually proved. The duties of the assignee in the collection and care of the assets are similar to those of administrators and guardians.

Rem. Jurisdiction over bankruptcy proceedings in this country resides both in the United States and in the individual States; but whenever a Federal Bankrupt System is in operation all State systems are suspended, except in reference to cases which do not fall within the Federal law. To distinguish one system from the other the Federal law is called the "*Bankrupt Act*," and the State laws are known as "*the Insolvent Laws*." Cases governed by the Bankrupt Act have no relation

to the probate courts, but are under the statutory regulation of the District Courts of the United States. Cases under the Insolvent Laws are properly cognizable in equity, but are frequently entrusted to the local courts of probate. A discharge under the State Insolvent Law protects the debtor only against such creditors as reside within the State, and such non-resident creditors as have proved their claims; a discharge under the Bankrupt Act is of universal operation.

READ: 2 Bl. Com., pp. 471–488;
2 Kent Com., Lect. xxxvii, pp. 389–408;
3 Parsons on Contracts, pp. 423–525.

§ 407. Of General Probate Jurisdiction: Guardians: Trustees, etc.

Although *guardianships* are properly within the jurisdiction of courts of equity, yet their frequent intimate connection with the estates of deceased persons has rendered it expedient to place them also under the direction of courts of probate; sometimes indeed under their exclusive original jurisdiction, with an appellate jurisdiction in the equity courts. The appointment of a guardian for an infant or incapable is made upon the application of some interested person, setting forth the infancy or incapacity of the proposed ward, his residence, his ownership of property, the non-existence of a guardian, and praying that a guardian be appointed. Thereupon a citation issues to all persons having a right to be heard, and upon a trial and judgment in favor of the applicant the appointment is made. Petitions for the removal of the guardian, or for permission to resign, and all periodical and final accounts are within the cognizance of the same courts. *Testamentary trustees* and their successors are often, for the same reasons, placed by law under the supervision of the probate courts.

Rem. In addition to the foregoing matters many affairs of lesser consequence, but requiring some official aid or oversight, are confided to the probate courts. Often these are the lowest and most accessible tribunals having a judge, a clerk, a record, and a seal; and are thus able to render ministerial and judicial services of various kinds more easily and economically than any other governmental body. The tendency in modern legislation to place all such assistance within convenient reach of every citizen has made these courts available for the adoption

of children, the change of personal names, the binding out of apprentices, proceedings in divorce, *habeas corpus*, and other remedies, the character of which must be ascertained by consulting current local statutes.

READ: 3 Redfield on Wills, pp. 434–459;
Rice on American Probate Law, pp. 472–558.

§ 408. Of the Pleadings in Courts of Probate.

The *procedure in probate courts* resembles that in courts of equity, and is of equal directness and simplicity. The application, by which the aid of the court is usually invoked, is in the form of a *petition* setting up the jurisdictional facts, and praying for the necessary relief. Where the proceeding involves a controversy the adverse party presents his case in an *answer*, and both the answer and petition are amendable to any extent which may be requisite to make the court fully acquainted with the antagonistic claims. The *process* is a citation to appear and show cause, enforced by an attachment for contempt where the presence of the respondent is essential to the progress of the cause, — as, for example, when it demands an account or a disclosure.

Rem. Appearance and answer may be made in courts of probate either by the parties in person, or by agents or attorneys. The judge himself is also the adviser of the parties; it being his official duty to see that all things are rightly done. Infants may appear on their own behalf in many cases, though when a controversy arises, and judicial action as to their personal or property rights becomes necessary, they must be represented by next friend or guardian.

READ: Rice on American Probate Law, pp. 41–50;
Croswell on Executors and Administrators, §§ 250–259;
Croswell's Handbook on Executors and Administrators, § 56;
Woerner on American Administration Law, §§ 148, 149, 261–265;
Page on Wills, §§ 318, 319.

§ 409. Of the Trial and Judgment in Courts of Probate.

The *trial* of an issue by a court of probate may be conducted by the judge in person, or in proper cases before referees whose report, when filed, accepted and confirmed, becomes the action of the court. The rules of evidence and its production are

substantially the same as those observed in the equity courts in the same State. From probate judgments involving any important issue appeals are generally allowed by statute to the higher courts of equity or common law, with provision for a jury trial if the nature of the controversy is such as to demand it.

Rem. The judgment of a probate court upon any matter within its jurisdiction is equally conclusive with that of any other tribunal. If the judgment is *in rem*, — as, for example, sustaining the validity of a will or the necessity of a sale of assets, — it binds all the world. If *in personam*, it operates as an estoppel on the parties and their privies, to prevent them from averring the contrary of its decrees. But like all other judgments it may be set aside on direct application to the court itself for fraud, collusion, or mistake; and may be collaterally attacked for want of jurisdiction.

READ: 3 Redfield on Wills, pp. 56–65, 115–125;
Rice on American Probate Law, pp. 447–471;
Croswell on Executors and Administrators, §§ 12–34;
Croswell's Handbook on Executors and Administrators, §§ 10, 12, 13;
Woerner on American Administration Law, §§ 145–147, 266–274;
Schouler on Executors and Administrators, §§ 150–161;
Page on Wills, §§ 340–346.

BOOK III

OF PUBLIC RIGHTS

§ 410. Of the Nature of Public Rights: Sovereignty.

A *public right* is a right which inheres in the State either against other States or against its own subjects, or which resides in its own subjects against the State. The common foundation of all such rights is the intrinsic nature of the State, which determines alike the usages of nations and the precepts of positive human law. A *State* is a political society, organized by the common consent of the people inhabiting a certain territory, for purposes of mutual advancement, protection, and defence, and exercising whatever powers may from time to time become necessary to that end. A State is distinguished from all other human societies — domestic, ecclesiastical, or commercial — by its political or civic character; and from all other forms of political society by its exercise of *unlimited dominion* over all persons and property within the territory which it occupies. Other societies are organized by the common consent of their members, and are intended for their mutual advantage; the State alone, in addition to these qualities, is at once political and supreme. This political supremacy of the State constitutes its *sovereignty*, and is its one essential attribute. Its limits cannot be defined. Its ingrediental elements cannot be enumerated. As it comprises every power necessary to the accomplishment of the end for which the State exists, its scope at any given moment can be determined only by the exigencies in which the State is at that moment placed. To meet these exigencies, however vast and unprecedented they may be, the sovereignty of the State, from the very fact that it *is sovereignty*, must always be sufficient.

Rem. The precise distinction between private rights and public rights is this, — that private rights are both vested in and

assertible against private persons only, while public rights may reside in private persons and be exercised against public persons, or may inhere in public persons and be enforcible against all other persons whatsoever, whether public or private. All public rights, with their corresponding duties, affect the public interests and are, therefore, governed by public law.

READ: 1 Bl. Com., pp. 46–49;
Rob. Am. Jur., §§ 7, 123, 178;
1 Austin on Jurisprudence, pp. 220–341;
1 Woolsey on Political Science, pp. 139–144, 208–220;
Jameson, Constitutional Conventions, §§ 18–62;
Wharton, American Law, §§ 135–139;
Walker, American Law, § 5;
Woolsey, Int. Law, §§ 36, 37;
Glenn, Int. Law, §§ 9–32;
Wheaton, Int. Law, §§ 16–19;
Davis, Int. Law, pp. 34–36, 39;
Cooley, Const. Law, pp. 20–22;
Cooley, Const. Lim., pp. 3, 4;
Tucker on the Constitution, §§ 1–51;
Morse on Citizenship, §§ 1, 2.

§ 411. Of Sovereignty, Internal and External.

The sovereignty of a State manifests itself in two forms, as (1) Internal Sovereignty; and (2) External Sovereignty. *Internal Sovereignty* is the power of the State to make and enforce, for the government of itself and its own subjects, any laws whatsoever which are not inconsistent with the purposes for which the State exists. *External sovereignty* is the power of the State to assert and maintain its own independence of and entire political equality with other States, and to vindicate its rights against them, whenever necessary, by an open and formal public war. Sovereignty, in both of these forms, includes supreme power over all the *fruits* resulting from its exercise; including all the domestic wealth accumulated under its legal protection, and all territory and population ceded or subjugated to it in its intercourse with foreign States. In the continual extension of sovereignty to new subjects consists the development of progressive States, as in its restriction is apparent their decline; and with the total loss of either of its forms, whether by successful revolution from within or conquest from without, sovereignty is destroyed and the State, as a supreme political society, ceases to exist.

Rem. The original *seat of sovereignty* is in the people by whose consent and for whose benefit the State was organized. The *people* are the citizens of the State; the persons who by their own acts, concurring with the acts of the other members of the State, have become incorporated into it as integral portions of the commonwealth. Not all the inhabitants of the territory governed by a State necessarily belong to its people, nor is it essential that every citizen of a State should always reside within its boundaries. What individuals constitute the people of a State at any particular moment, therefore, depends upon the provisions of its own organic law. Moreover, sovereignty inheres in the people of a State, not distributively but *collectively*, as a community or artificial unitary being, whose will is exercised in the only way in which the volitions of a collective being can be adequately exercised, — namely, by the act of a majority of its members. In States of limited membership and narrow territory sovereignty may be exerted directly by the people; all governmental functions being performed by the co-operation of the whole number or by the major portion of its citizens. In States whose larger population or wider area render this direct exercise of popular sovereignty impossible, the sovereign powers of the people are necessarily delegated, to a greater or less extent, to officers who represent the people; and a *governmental system*, distinct from but dependent on the body of the people, is produced in which, as long as it endures, the delegated sovereignty resides. Against this delegated sovereignty no individual citizen, nor faction of the citizens, can rightfully rebel. The sole power to withdraw or modify it rests with the collective people by whom it was conferred; they acting by a peaceful reconstruction of the governmental system through the vote of the majority, or by a violent revolution in which all concur or to which non-concurrents finally submit. Every sovereign power which has not thus been delegated to the current governmental system remains in the collective people, and may at any time be exercised by them directly, or through other delegates, in any manner not subversive of the authority already vested in the established government.

READ: 1 Woolsey on Political Science, pp. 198–207;
Andrews, American Law, §§ 77–126;
Wheaton, Int. Law, §§ 20, 21;
Moore, Int. Law, §§ 175–188;
Cooley, Const. Law, pp. 275–294;
Cooley, Const. Lim., pp. 892–944;
Foster on the Constitution, § 39;
Tucker on the Constitution, §§ 52, 53, **60**;
Morse on Citizenship, §§ 3, 4;
Webster on Citizenship, §§ 20–47.

§ 412. Of Constitutional Government.

The establishment of a permanent governmental system, to which the exercise of sovereign powers is delegated by the people, gives to the State its *constitution* or organic form. Such constitutions may be the work of ages, — the people manifesting their collective will and wisdom in gradually accumulating customs, corrected and extended by experience but never reaching final and complete expression; or they may be begun and finished in a brief popular convention which by one supreme legislative act creates the entire governmental system, with all its elements and combinations, and ordains the rules by which its exercise of sovereign powers shall be directed. Examples of the gradual development of customary governmental systems are found in the British Constitution, and in the unwritten constitutions of the original American States; an example of systems legislatively created by the people is the Federal Constitution of the United States. The effect of the establishment of a new governmental system, upon the exercise by the collective people of their sovereign powers, varies according to the method and degree in which sovereignty has hitherto been delegated. No constitution, written or unwritten, can in any measure increase or diminish the ultimate sovereignty of the people; its utmost possible result in any case is to suspend the exercise of certain sovereign powers by the collective body, and vest it in the public officers of whom the governmental system is composed. When this system has been gradually evolved by custom the scope of its delegated authority, at any given moment, is indicated by the powers which it asserts and in which the collective people acquiesce; and the adoption of a new constitution by the people curtails or extends existing powers according to the effect of its provisions, as compared with the authority already exercised. Hence in States where the entire practical dominion has been customarily entrusted to the governmental body, as in a pure democracy or aristocracy or monarchy, a new constitution can be only a *reassertion* or a *limitation* of its powers. On the other hand, in States newly created by a written or other formal constitution, like the United States, and in which political supremacy has hitherto resided in the people as a whole, the constitution is a specific *grant* of powers; the governmental

system it produces has no authority beyond that which the constitution expresses or necessarily implies; and all powers not thus granted remain for present exercise and possible future delegation in the collective people of the State. In like manner, where a constitution is amended, or is superseded by another, a comparison between them will determine whether the sovereignty delegated to the governmental system has been restricted or enlarged.

Rem. A sovereign State, although politically supreme, is nevertheless *subordinate to law.* As it derives its existence through the law of nature from the eternal law, the immutable principles of reason and justice which call it into being impose upon it certain rules of action, which it cannot disregard without its own destruction. It receives its sovereign powers from the people upon the *trust* that it will exercise them for the purposes for which they were bestowed, and forfeits them by their disuse or abuse. It holds its place among the nations of the earth upon the *condition* that it will observe the traditions and usages which the nations have, by common consent, adopted as their guide in the conduct of their intercourse with one another. Thus on every side the State is hemmed in and controlled by law. The fundamental principles and express provisions which define and regulate the powers included in its internal sovereignty form its *Constitutional Law,* obedience to which may be enforced by the people, — ordinarily by nullifying its action through the courts, but in extraordinary cases by overturning the government itself. The usages and traditions which direct the operations of its external sovereignty are comprised in the doctrines and precedents of *International Law,* a neglect of which in any matters may result in war, and whose persistent disregard may provoke its total exclusion from the family of nations, and its deprivation of all the privileges and immunities which the union of nations under a legal sanction was intended to secure.

READ: Rob. Am. Jur., §§ 240–246;
1 Woolsey on Political Science, pp. 282–290;
Walker, American Law, §§ 10–15;
Clark, Elementary Law, §§ 8–11;
The Federalist (Ford's Ed.), Introd., pp. vii–xix;
Cooley, Const. Law, pp. 22–24, 26–33, 36–43, 218–223;
Cooley, Const. Lim., pp. 4–11, 70–123, 227–260;
Story on the Constitution, §§ 198–456, 1832–1842;
Hare, Const. Law, pp. 119–240;
Miller on the Constitution, pp. 1–34;
Foster on the Constitution, §§ 1–10;

Tucker on the Constitution, §§ 53–59, 69–185, 386–390;
Bryant on the Constitution, pp. 1–7, 282–291;
Tiedeman on the Unwritten Constitution, pp. 16–45, 155–165.

§ 413. Of the External Sovereignty of the United States.

The United States is a State *created* by a written constitution, and consequently possesses all those powers, and those powers only, which are expressed in or are necessarily implied from the language of that instrument itself. The *purpose and effect* of the Federal Constitution were twofold: (1) To combine the several States and their people into a new State, coequal in all respects to the other independent nations of the earth; (2) To define and locate in the proper branches of the Federal government those sovereign powers which the new State then received. By creating a new State, coequal to other independent nations, the Constitution bestowed on it *complete* external sovereignty, including every power which either then, or at any future time, should become necessary to its existence as a nation, or vest in it under the ancient laws and customs by which the external sovereignty of other nations should be controlled.

Rem. The language of the Constitution neither does nor could define or limit these external powers. It could designate the branches of the government by which such powers should be exercised, but the foresight of no jurists or statesmen was sufficient to discern and prescribe the future methods of their application, or the subjects to which they might eventually extend. The same indefiniteness is predicable of the authority of the United States over the *fruits* arising from the exercise of its external sovereignty; as in the case of territory or population acquired by treaty or by war. The Constitution neither decides the moment and the mode by which these pass from the domain of the external into that of the internal sovereignty, nor defines their status nor directs the method of their administration during the transition period between the date when the external sovereignty over them begins, and that at which it is displaced by the internal. All these are matters which human wisdom is not competent to foreordain, but which each independent nation must determine for itself when the event occurs, in the light of their then existing international usages and rules.

READ: 1 Kent Com., Lect. x, pp. 201–219;
Cooley, Const. Law, pp. 98–102;
Foster on the Constitution, § 40.

§ 414. Of the Internal Sovereignty of the United States.

The *powers included* in the internal sovereignty of the United States are of two classes: (1) Those which are necessary to the maintenance of its external sovereignty, — such as the power to raise and support armies or to collect revenue for national purposes; (2) Those which are necessary to produce uniformity throughout the entire nation in reference to matters which cannot advantageously be regulated by divergent local laws, — such as the postal, patent, and bankrupt systems, the relations created by interstate commerce, and the standard of weights and measures.

Rem. The powers of the first class are, to some extent, enumerated in the Constitution; but all those which ever can, in any possible emergency, be essential to the United States, for the preservation of its coequal rank among the independent nations of the world, are implied in its creation as a State, and are covered by that sweeping clause of the Constitution which confers upon it every incidental power that may be necessary for carrying its general powers into effect. The powers of the second class are, for the most part, specified in the text of the Constitution, and to them others may be added from time to time by amendment, as occasion may arise.

READ: Walker, American Law, §§ 24–29;
Clark, Elementary Law, §§ 17–20;
Cooley, Const. Law, pp. 105–107;
Story on the Constitution, §§ 457–517;
Hare, Const. Law, pp. 96–118;
Foster on the Constitution, §§ 13–34;
Tiedeman on the Unwritten Constitution, pp. 129–154.

§ 415. Of the Sovereignty of the Individual States of the American Union and of their People.

The Federal Constitution expressly reserves to the *respective States*, or to their people, all sovereign powers not delegated by the Constitution to the United States, nor prohibited by it to the individual States. The character and scope of these *reserved powers*, though undefined, are with approximate accuracy ascertainable. In the *first place*, all powers included in external sovereignty, or incidental thereunto, being delegated to the United States are thereby denied to the respective States and to their people. In the *second place*, where the United States has

exercised its constitutional power to establish uniform laws and institutions throughout all the States, no State or people can set up institutions or enact and enforce laws which are incompatible therewith. In the *third place*, all powers included in internal sovereignty, except those which are prohibited by the Federal Constitution to the individual States, reside in the respective States or in their people. Where the line is to be drawn between the powers vested in the States as governmental systems, and those residing in their people, depends in part upon their written constitutions, and in part upon the sovereignty which had been delegated by the people to the State before its written constitution was adopted. In every State in the Union, — in the thirteen original States actually, and in all later States theoretically, — the State is older than its written constitution, and in that primitive stage enjoyed a sovereignty whose limitations and inclusions were determined by the authority which it customarily asserted and which its people collectively obeyed. Its written constitution either ratified or extended or abridged these sovereign powers, or passed them by unnoticed. Those which it ratified or passed unnoticed the State still retains. Those which it abridged exist within the limits fixed by the abridgment. Those which it extended were then, for the first time, conferred by the people on the State. The present sovereign powers of any individual State of the Union, therefore, consist of those powers which vested in it under its unwritten constitution, with such abridgments and extensions as its written constitution and the Federal Constitution have ordained. All other powers embraced in internal sovereignty remain in its collective people, to be exercised or delegated when they will.

Rem. The powers prohibited by the Federal Constitution to the individual States are these: (1) To enter into any treaty, alliance, or confederation with other States; (2) To grant letters of marque or reprisal; (3) To coin money, emit bills of credit, or make anything but gold and silver legal tender for the payment of debts; (4) To pass bills of attainder, or *ex post facto* laws, or laws impairing the obligation of contracts; (5) To grant any title of nobility; (6) To lay duties upon exports or imports, except what may be absolutely necessary for executing its inspection laws, nor any tonnage duty, without the consent of Congress; (7) To keep troops or ships of war in time of peace, or enter

into any agreement with another State or with a foreign power, or engage in war unless actually invaded or in such imminent danger as to admit of no delay, without the consent of Congress; (8) To deny full faith and credit to the public acts, records, and judicial proceedings of the other States, or to withhold from the citizens of the other States the immunities and privileges enjoyed by its own citizens; (9) To refuse to deliver to another State a fugitive therefrom for crime, or to his lawful owner any person escaping from servitude; (10) To adopt any form of government which is not republican; (11) To permit within its borders any slavery or involuntary servitude, except for a crime of which the party has been lawfully convicted; (12) To pass a law abridging the immunities of any citizen of the United States; (13) To deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of its laws; (14) To deny to any male inhabitant of any State, who at the time is of the age of twenty-one years and is a citizen of the United States, the right to vote for President or Vice-President of the United States, or for Representative in Congress, or for the executive or judicial officers of the State, or for the members of its legislature, except on account of his participation in rebellion or other crime; (15) To deny to any person the right to vote on account of race, color, or previous condition of servitude; (16) To pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave.

READ: 1 Kent Com., Lect. xix, pp. 407–446;
Rob. Am. Jur., §§ 247–253;
Clark, Elementary Law, §§ 21, 22;
Cooley, Const. Law, pp. 3–19, 29, 33–36, 182–206, 208–217;
Cooley, Const. Lim., pp. 35–69, 124–186;
Story on the Constitution, §§ 159–197, 1906–1909;
Hare, Const. Law, pp. 35–37, 94–96;
Foster on the Constitution, §§ 11, 12, 41;
Bryant on the Constitution, pp. 317–321;
Tiedeman on the Unwritten Constitution, pp. 110–128.

CHAPTER I

OF THE LAW OF INTERNAL SOVEREIGNTY: CONSTITUTIONAL LAW

§ 416. Of the Functions of Government.

The *internal sovereignty* of a State manifests itself through the performance of three governmental functions: (1) The Legislative, which makes laws; (2) The Judicial, which interprets and applies laws; (3) The Executive, which enforces laws. The location and relation of these functions in the State constitute its *form of government,* and determine whether it is a *monarchy,* in which these functions center in a single individual; or an *aristocracy,* in which they are entrusted to a ruling class; or a *democracy,* in which they are discharged by the whole people in a popular assembly; or a *republic,* in which they are performed by representatives chosen by the people.

Rem. In a pure monarchy and in a democracy these governmental functions are inseparable, but in an aristocracy or a republic they may be divided, and legislative powers may then reside in one group of persons, judicial powers in a second group, and executive powers in a third. Modern theories concerning the welfare of the State and the security of citizens demand this separation, and toward it, as also toward the republican form of government, all civilized nations now evidently tend. This form of government, and this distribution of governmental functions, were spontaneously adopted by the American States when they repudiated the authority of the British crown; were deliberately incorporated into the organic structure of the United States, and are perpetually guaranteed both to the United States and to every individual State by the provisions of the Federal Constitution.

READ: 1 Bl. Com., pp. 49–51, 146–155, 181–186;
Rob. Am. Jur., § 8;
Walker, American Law, §§ 7, 8;
Andrews, American Law, §§ 182–187;
Clark, Elementary Law, §§ 12–16, 23;

1 Woolsey on Political Science, pp. 290–293;
Davis, Int. Law, pp. 40, 41;
Cooley, Const. Law, pp. 44–47, 160–181;
Story on the Constitution, §§ 518–544;
Miller on the Constitution, pp. 59–116;
Foster on the Constitution, §§ 42–45;
Webster on Citizenship, pp. 47, 48.

§ 417. Of the Legislative Function of the United States.

The *legislative function* of the United States is, by the Constitution, located in Congress, — an assembly composed of a House of Representatives elected directly by the people, and a Senate chosen by the legislatures of the respective States, — the concurrence of both these bodies being necessary to the performance of any legislative act. The general *legislative power* of the United States extends to every measure essential to the preservation and enforcement of its external or internal sovereignty, unless expressly forbidden by the Constitution; and to all measures enumerated in the Constitution whether they are essential to its sovereignty or not.

Rem. The *measures forbidden* to Congress by the Constitution are these: (1) To suspend the writ of *habeas corpus*, except in times of rebellion or invasion where the public safety requires it; (2) To grant any title of nobility, or pass any bill of attainder or *ex post facto* law, or abridge the right to vote on account of race, color, or previous condition of servitude; (3) To make any law respecting an establishment of religion or prohibiting the free exercise thereof; (4) To pass laws abridging the freedom of speech or of the press, or the right of the people to peaceably assemble or to petition the government for a redress of grievances, or to keep and bear arms; (5) To take private property for public use without just compensation; (6) To call in question the validity of the lawful public debts of the United States; (7) To lay a direct tax except in proportion to the enumeration of the public census; (8) To tax the exports from any State, or to show any preference to any State in the regulation of commerce or in imposing revenue duties, or to compel vessels plying between the different States to enter, clear, or pay duties; (9) To expend any money unless in consequence of appropriations made by law. The measures which the Constitution *expressly confers* upon Congress the power to adopt are the following: (1) To levy and collect uniform duties, taxes, imposts, and excises, in order to pay the debts and provide for the common defence and

general welfare of the United States; (2) To borrow or coin money, to regulate its value and that of foreign coin, to punish counterfeiting, and to fix the standard of weights and measures; (3) To establish a uniform system of naturalization throughout the United States; (4) To establish and maintain a national postal service; (5) To regulate commerce between the States and with foreign nations, and with the Indian tribes; (6) To issue patents for inventions, and copyrights for literary productions; (7) To establish a uniform system of bankruptcy; (8) To constitute judicial tribunals inferior to the Supreme Court of the United States; (9) To control, through the action of the Senate, all treaties with foreign nations, and the appointment of the principal political, judicial, and executive officers of the United States; (10) To admit new States to the Union, govern the territories and other property of the United States, and propose amendments to the Constitution; (11) To prescribe the mode by which proof concerning the acts, records, and judicial proceedings of one State shall be made in the courts of another State, and what shall be the effect thereof; (12) To exercise exclusive jurisdiction over the district in which may be the seat of government of the United States, and over all public lands or buildings owned by the United States within the limits of an individual State; (13) To fix the penalty for treason, and to punish piracy and felony on the high seas, and other offences against the law of nations; (14) To declare war, raise and support armies and navies, prescribe laws for the government of the land and naval forces, provide for calling out the militia of the States and arm and govern them, issue letters of marque and reprisal, and make rules for captures both on land and sea; (15) To make all other laws which shall be necessary for carrying into effect the foregoing powers, and all other powers vested by the Constitution in the government of the United States. In addition to the foregoing measures, and as further safeguards to the liberty and welfare of the people, the Constitution *also provides* that all bills for revenue, and all proceedings for the impeachment of the President, shall originate in the popular body, — the House of Representatives; and that no measure can become a law unless it receives the express or implied approval of the President, or is supported by at least two-thirds of the members of each House of Congress.

READ: 1 Kent Com., Lects. xi, xii, pp. 221–268;
Walker, American Law, §§ 30–37, 52, 53, 56–80;
Andrews, American Law, §§ 188–284, 296–314;
Cooley, Const. Law, pp. 47–51, 64–98, 102–105, **107–114**;
Cooley, Const. Lim., pp. 11–18, 186–226;
Story on the Constitution, §§ 545–880, 892–1352;
Hare, Const. Law, pp. 427–503;
Miller on the Constitution, pp. 189–216, **433–473, 523–565**;

Tucker on the Constitution, §§ 186–337;
Bryant on the Constitution, pp. 8–205;
Marshall's Decisions, pp. 1–41 (1 Cranch, 137–180), 194–217 (2 Cranch, 87–148), 299–338 (4 Wheat. 518–715).

§ 418. Of the Judicial Function of the United States.

The *judicial function* of the United States is exercised by the Supreme Court of the United States, and by such inferior courts as Congress may from time to time ordain and establish. At present these inferior courts are the Circuit Courts, the Circuit Court of Appeals, the District Courts, the Court of Claims, and various other tribunals in the District of Columbia, in the Territories, and in the different executive departments of the government. The judges of these courts are appointed by the President, subject to the approval of the Senate, or in pursuance of some special Act of Congress; and those presiding over the courts above specifically named hold office during good behavior. The *judicial power* of the United States extends: (1) To all cases in law and equity arising under the Federal Constitution, the laws of the United States, and treaties made under its authority; (2) To all cases affecting ambassadors, other public ministers, and consuls; (3) To controversies between two or more States, or between citizens of different States, or between citizens of the same State claiming lands under grants of different States; (4) To suits by one State against the citizens of other States or against foreign States, citizens, or subjects; (5) To all cases of admiralty and maritime jurisdiction.

Rem. The *restraints placed* by the Constitution upon the exercise of this judicial power relate chiefly to prosecutions and punishments for crimes, and provide: (1) That no unreasonable searches or seizures shall be made, and that all seizures and searches whatsoever must be based upon a warrant issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched or the thing or person to be seized; (2) That no person shall be held for any capital or infamous crime except upon a presentment or indictment by a grand jury, unless in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; (3) That no person shall be deprived of life, liberty, or property without due process of law; (4) That no person shall be twice put in jeopardy of life or limb for the same offence;

(5) That excessive bail should not be required; (6) That every accused person shall have a speedy and public trial by an impartial jury of the State and District where the crime was committed, or, if not committed in any State or District, then of the place appointed by the Acts of Congress; (7) That every accused person shall be informed of the nature and cause of the accusation, shall be confronted with the witnesses against him, shall have compulsory process for obtaining witnesses in his favor, and the assistance of counsel for his defence; (8) That no person shall be compelled to be a witness against himself; (9) That no excessive fines shall be imposed, nor any cruel or unusual punishment be inflicted; (10) That no act shall be regarded as treason against the United States except the act of levying war against the United States or the act of adhering to their enemies giving them aid and comfort; (11) That no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court; (12) That no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. In reference to civil actions the Constitution guarantees a trial by jury where the action is at common law, if the value of the matter in controversy exceeds twenty dollars, and forbids any fact once decided by a jury to be re-examined in any court of the United States otherwise than according to the rules of the common law. Upon that provision of the Constitution which extends the judicial power of the United States to all cases in law or equity arising under the Federal Constitution, the laws of the United States and treaties made under its authority, no definite limits can be placed. In effect it makes the judicial function as broad and flexible as the legislative function, since whatever rights may at any time be conferred by the Constitution, the treaties, or the Acts of Congress may also be vindicated in the Federal Courts.

READ: 1 Kent Com., Lects. xiv–xviii, pp. 290–386;
Rob. Am. Jur., §§ 352–364;
Walker, American Law, §§ 44–50;
Cooley, Const. Law, pp. 52–54, 123–159, 310–362;
Cooley, Const. Lim., pp. 22–35, 419–595;
Story on the Constitution, §§ 1573–1803;
Miller on the Constitution, pp. 309–350, 373–418, 485–510;
Tucker on the Constitution, §§ 364–385;
Bryant on the Constitution, pp. 221–243, 292–317.

§ 419. Of the Executive Function of the United States.

The *executive function* of the United States is exercised by the President and the various subordinate officers through whom the

administration of public affairs is conducted. The President is elected by the people indirectly through a body of delegates; the subordinate officers are appointed by him unless Congress otherwise provides. His *constitutional powers* are: (1) To be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; (2) To make treaties with foreign States by and with the advice and consent of the Senate; (3) To nominate and, with the consent of the Senate, to appoint ambassadors, public ministers, consuls, judges of the Supreme Court, and other officers for whose designation no other method is prescribed by law; (4) To grant reprieves and pardons for offences against the United States, except in cases of impeachment; (5) To veto Acts of Congress, and thus prevent their enactment unless adopted by two-thirds of each House after hearing his objections; (6) To communicate to Congress information as to the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; (7) To convene Congress in a special session upon extraordinary occasions and, when its Houses disagree as to the time of their adjournment, to adjourn them to such time as he thinks proper; (8) To receive ambassadors and other public ministers; (9) To see that all the laws of the United States are faithfully executed; (10) To protect the individual States against invasion by a foreign enemy and also, when requested by the State, against domestic violence.

Rem. Of these powers some are definitely limited, others are incapable of limitation. As *commander-in-chief* of the army and navy the President is, in time of war, clothed with the entire external sovereignty of the United States in reference to the hostile State; the only potent check upon his operations being the power of Congress to withhold supplies. His duty to enforce the laws of the United States places at his command all methods of enforcement which the Constitution does not forbid, and this without regard to the place where or the persons by whom the laws are disregarded. Indirectly by his power of appointment to office, directly by his veto power, he can exercise an almost irresistible influence upon the course of legislation, and even upon the action of the courts. The *sole restraint* upon his usurpation or abuse of power is by his impeachment and removal from office.

READ: 1 Bl. Com., pp. 190–196, 233–252, 257–263, 266–273;
1 Kent Com., Lect. xiii, pp. 271–289;
Walker, American Law, §§ 38–43;
Andrews, American Law, §§ 315–325;
Cooley, Const. Law, pp. 51, 52, 114–122;
Cooley, Const. Lim., pp. 19–22;
Story on the Constitution, §§ 881–891, 1410–1572;
Miller on the Constitution, pp. 145–176;
Tucker on the Constitution, §§ 338–363;
Bryant on the Constitution, pp. 206–221.

§ 420. Of the Governmental Functions of the Individual States of the American Union.

In the individual States the *governmental functions* are separated as they are in the United States; the legislative being exercised by a representative body composed of two Houses, whose agreement is necessary to legislative action; the judicial being discharged by courts established according to law; the executive being performed by a governor and various subordinate officials. This separation is not, however, always so complete as in the case of the United States; some of the older States still recognizing in their legislative bodies certain judicial or executive powers which were vested in them before the States adopted written constitutions.

Rem. The *legislative function* of an individual State does not extend to any matter of external sovereignty; nor to any matter of internal sovereignty which by the Federal Constitution is placed within the exclusive jurisdiction of the United States; nor to any matter within the concurrent jurisdiction of the State and the United States upon which the legislature of the United States has already acted; nor to any matter expressly or impliedly prohibited to it by the State or Federal Constitutions; nor to any matter contrary to the purposes for which the State was organized; nor to any matter which infringes on the reserved rights of the people of the State, as interpreted by the conditions and circumstances under which the State constitution was adopted. The *judicial function* of the courts of a State is conferred upon them by its Constitution or by legislative acts, by which also it is distributed and defined both as to its subjects-matter and its mode of exercise. State courts can take *no cognizance* of any subject which, by the Federal Constitution, is placed within the exclusive jurisdiction of the Federal courts, or of which the Federal courts have any jurisdiction if Congress has made that jurisdiction exclusive,

— as has been done in reference to prosecutions for offences against the laws of the United States, to suits for penalties or forfeitures incurred under the laws of the United States, to civil causes in admiralty and seizures under the laws of the United States on lands or waters outside its maritime jurisdiction, to proceedings under a Federal Bankrupt Act, to actions arising under the Patent and Copyright Laws of the United States, and to civil suits to which a State is a party unless the suit is between the State and its own citizens, or between the State and citizens of other States or of a foreign country. Nor does the authority of a State court extend to questions reserved by the State constitution for the determination of its own legislative body; nor to suits against the State unless they have been instituted with the State's consent; nor to persons or property outside its territory except so far as these may be affected by judicial orders and decrees against property or persons within its territory. For the most part, moreover, State courts are *courts of limited jurisdiction*, whose powers are enumerated in the Constitution or statutes by which they are created. The *executive functions* of the individual States are vested in their governors and other officers, whose powers and duties differ in the different States, and are defined and prescribed in their respective laws.

READ: 1 Kent Com., Lect. xviii, pp. 387–404;
Andrews, American Law, §§ 326–363;
Clark, Elementary Law, §§ 24, 25;
Cooley, Const. Law, pp. 381–392;
Cooley, Const. Lim., pp. 365–418;
Story on the Constitution, §§ 1353–1409;
Miller on the Constitution, pp. 573–597;
Bryant on the Constitution, pp. 243–282;
Prentice and Egan on Commerce Clause, pp. 1–46;
Marshall's Decisions, pp. 180–193 (5 Cranch, App. 115–141), 226–251 (4 Wheat. 122–208), 252–298 (4 Wheat. 316–437), 357–420 (6 Wheat. 264–447), 421–467 (9 Wheat. 1–240), 468–511 (9 Wheat. 738–903), 512–519 (9 Wheat. 904–914), 520–548 (12 Wheat. 419–460), 549–585 (12 Wheat. 213–369), 604–616 (2 Peters, 449–480).

§ 421. Of Police Powers.

The *police powers* of a State are sometimes spoken of as if they constituted a distinct branch of its sovereignty, and were exercisable without restraint. They are, however, nothing more than the application in detail of its governmental functions to those relations between the State and its subjects which are essential to the existence of the State, and upon whose proper

regulation the welfare of the entire people in a large measure depends. They *extend*, as a matter of course, to every person, to every private and public right, to every species of property, and to every aspect of political, social, and individual life. They are *inherent* in the State as a State, and cannot be curtailed or abrogated by any contract it may make with other States or individuals, nor by the consequences which their exercise entails upon its citizens.

Rem. Police powers of a State are subject to the same constitutional and *reasonable limitations* as any other portion of its sovereignty. Entrusted, as they often are, to local communities, commissioners, and other public officers, they are liable to gross abuse, and under color of them the most serious invasions of personal rights may at any time occur. Their cautious exercise by the legislature, and their strict interpretation by the courts, in view of the constitutional guaranties of life, liberty, and property, afford the only safeguards against the degeneration, by apparently legal methods, of a popular government into the worst of despotisms.

READ: Cooley, Const. Law, pp. 250–252, 338;
Cooley, Const. Lim., pp. 829–890;
Tiedeman on State and Federal Control, §§ 1–5, 10–233;
Prentice on Police Powers, pp. 1–82, 267–298, 339–360;
Moore, Int. Law, §§ 190–195.

§ 422. Of Subjects: Allegiance.

A *subject* is a person who is under a legal obligation to submit himself to the authority of the State as to matters embraced in its internal sovereignty. The tie which binds the subject to the State is called *allegiance*, and theoretically originates in the compact which is presumed to have been made between the subject and the State at the commencement of their political relations with each other. It is of two kinds: Natural and Local. *Natural allegiance* is coextensive with the internal sovereignty of the State, and continues until it is dissolved by the death of the subject or by the lawful transfer of his natural allegiance to another State. *Local allegiance* imposes on the subject a partial submission only to the internal sovereignty of the State in which he temporarily resides, and ceases when he departs from its territorial domain.

Rem. Judged by the *character of their allegiance* subjects are of two classes: Citizens and Aliens. A *citizen* is a person who is bound to the State by the tie of natural allegiance, and over whom all the powers contained in its internal sovereignty may be exercised. An *alien* is a citizen of a foreign country, residing in the State and while within its borders owing it a local allegiance, and subject to it in certain matters included in its sovereignty. An *alien friend* is an alien with whose State the State where he resides is at peace. An *alien enemy* is an alien with whose own State the State where he resides is at war.

READ: 1 Bl. Com., pp. 366–375;
2 Kent Com., Lect. xxv, pp. 39–42, 50;
Woolsey, Int. Law, §§ 65–70;
Davis, Int. Law, pp. 135–156;
Moore, Int. Law, §§ 534–566;
Morse on Citizenship, §§ 5–16;
Webster on Citizenship, pp. 1–11, 49.

§ 423. Of Citizens.

The *citizens of a State* are the actual members of the political body to which they belong. They constitute the *people* who compose the legal community, and who in their associated capacity have established or submitted themselves to the dominion of a government, for the preservation of their general welfare and the protection of their individual as well as their collective rights. Persons *become citizens* either by birth or by adoption. Every person who is *born both* within the dominions and under the jurisdiction of a State, is thereby made one of its citizens. The *dominions* of a State include its territorial area, the vessels which sail under its flag, and in a limited sense the premises occupied by its ambassadors and ministers at foreign courts. The *jurisdiction* of a State covers all persons within its dominions except the diplomatic representatives of foreign States with their attendants. It has indeed been claimed by certain States that birth *either* within the jurisdiction *or* the dominions of a State confers citizenship; that their citizens remain within their jurisdiction even when temporarily residing in foreign States; and consequently that children born to their own citizens while abroad acquire the citizenship of their parents and may assert its privileges upon returning to the parental State. Other States have refused to recognize this claim as having any legal basis; and where they have consented to treat such children as belong-

ing to the parental State, and entitled to the protection afforded by its laws, they have regarded their action as a voluntary concession to the parental State in a spirit of international comity, rather than as an admission of the right of such children to deny their natural allegiance to the State where they were born. The *adoption* of a citizen of a foreign State consists in the transfer by the citizen of his natural allegiance from one State to another, and its acceptance by the State to which it is transferred. No one can become a citizen or even a resident of a foreign State against its will. Until within the past century it was also a universal doctrine that no citizen could transfer his natural allegiance without the permission of his native State; but this doctrine has been gradually modified by treaties and international custom until the right to change allegiance with the consent of the adopting State is now generally recognized. Each State determines for itself the conditions on which it will receive the citizens of foreign States as its own citizens, or even as mere temporary subjects, and may when it deems best exclude them altogether.

Rem. Citizenship does not imply equality of political privileges irrespective of status. Such privileges depend upon the governmental system of the State, and may vary with different classes of the people. That adopted citizens are ineligible to certain offices; that women and children have no right to vote; that residents of unorganized territory cannot participate in the conduct of the government, — does not deprive them of any attribute of citizenship, nor disturb that equality of political rights as to which all citizens, as individuals, are alike before the law.

READ: 2 Kent Com., Lect. xxv, pp. 42–50, 51–53;
Cooley, Const. Law, pp. 88, 89, 271;
Wharton, Int. Law, §§ 171, 172 *a*, 176–182;
Glenn, Int. Law, §§ 92–95;
Davis, Int. Law, pp. 135–151;
Moore, Int. Law, §§ 372–376, 426–483;
Morse on Citizenship, §§ 18–85;
Webster on Citizenship, pp. 11–19, 50–53, 63–129.

§ 424. Of the Citizens of the United States.

All persons who are *born* within the dominions of the United States, except Indians and the children of the families of the official representatives of foreign nations, are citizens of the

United States. The *adoption* of citizens of foreign countries into the United States may be effected either by an Act of Congress, admitting into the Union an organized territory with its existing population; or by acquiring, and organizing under a governmental system, a foreign territory with its people; or by special laws conferring citizenship on certain individuals; or by general laws under whose operation any person, who complies with their conditions, can become a citizen. These general laws are commonly called the "*naturalization laws.*" The conditions they prescribe vary from time to time according to the views of Congress in reference to the welfare of the State.

Rem. The naturalization regulations now in force provide for the *admission to citizenship* of the following persons: (1) Adult aliens, resident in this country for not less than five years, who legally declared their intention to become citizens two years before their application for admission; (2) Adult aliens who have resided in this country for a continuous period of five years, three of which were during their minority; (3) Adult aliens who have been honorably discharged from the military or naval service of the United States; (4) Adult seamen who have served for three years on merchant vessels of the United States after declaring their intention to become citizens; (5) The widows and children of deceased aliens who in their lifetime legally declared their intention to become citizens; (6) The wives and infant children of adopted citizens. Some of these persons, such as the wives and minor children of adopted citizens, become citizens of the United States by operation of law. Others, like the adult alien residents, must be formally admitted by a court of record upon their oath abjuring their allegiance to their native State, and pledging their allegiance to the United States. Over the whole system of naturalization, as a method of adopting citizens into the United States, Congress has exclusive jurisdiction although it frequently employs, with their consent, the governmental agencies of the individual States for its administration.

READ: Rob. Am. Jur., §§ 54–73;
Walker, American Law, § 54;
Clark, Elementary Law, § 26;
Cooley, Const. Law, pp. 268–271;
Wharton, Int. Law, §§ 173–175, 183–188;
Glenn, Int. Law, §§ 96–99;
Moore, Int. Law, §§ 377–425;
Morse on Citizenship, §§ 86–130;
Webster on Citizenship, pp. 129–162, 295–300;
Webster on Naturalization, pp. 1–107;
Miller on the Constitution, pp. 275–308.

§ 425. Of the Citizens of the Individual States of the American Union.

All citizens of the United States are *citizens of the individual State* in which they were born or naturalized, or within which they have since become permanently domiciled. The allegiance of a citizen to his particular State renders him subject to its complete internal sovereignty, and continues until by his removal to another State he becomes a citizen therein. The *inhabitants of territories*, and of districts ceded to the United States, are citizens of the United States alone, and enjoy only such political rights as are conferred upon them by the Federal Constitution and the Acts of Congress.

Rem. No individual State can confer true citizenship except upon a citizen of the United States, though grants of certain special privileges to aliens, in reference to personal or property rights, are not invalid.

READ: Rob. Am. Jur., § 57;
Cooley, Const. Law, pp. 206–208, 272–275;
Morse on Citizenship, §§ 210–247;
Webster on Naturalization, pp. 108–120;
Tiedeman on the Unwritten Constitution, pp. 91–109.

§ 426. Of the Rights of the State over the Persons of its Subjects.

The *rights of a State* over the persons of its subjects are two-fold: (1) The right to their obedience; and (2) The right to their support. *Obedience to the State* includes obedience to all laws made by the legislature in the legitimate exercise of its governmental functions; obedience to all valid judicial orders and decrees; and obedience to executive officers when acting within the scope of their lawful authority. *Support to the State* includes all forms of obligatory personal service rendered to the State, whether by action or forbearance; as, for example, in its military or naval forces, in aiding officers to capture criminals or levy civil process, or in the performance of jury duty. The right to obedience and support implies the right to compel them; for which purpose every State has the incidental right to coerce the unwilling and punish the disobedient.

Rem. Not to an equal extent, however, are citizens and aliens affected by these rights. Laws which prohibit action bind all subjects alike; those which command action bind aliens only so far as the prescribed action may be consistent with their duty to their own States. The limits of the personal service which the State may require from its own citizens are fixed by its Constitution; those which it may require from an alien are determined partly by its constitution and partly by its treaties, by the usages of nations, and by the conditions on which it may have admitted him to reside within its borders. Hence, as a general rule, an alien is not allowed to participate in political affairs, nor obliged to serve in any public capacity, although in reference to private duties he may occupy the same position as a citizen.

READ: 2 Kent Com., Lect. xxv, pp. 53–73.

§ 427. Of the Rights of the State over the Property of its Subjects.

Property derives its principal value from the protection which it receives from the State, and from the laws by which its acquisition, enjoyment, and transfer are controlled. The *right of the State* to take, in return for that protection, so much of the property of its subjects as might be necessary for its own maintenance has never been seriously questioned. This right may be exercised either (1) By taking and disposing of the property itself; or (2) By compelling the owner of the property to pay into the public treasury a sum of money bearing some proportion to the value of the property. One form of taking and disposing of the property is that of *eminent domain*, which, under our American constitutions, is lawful only when the property is clearly necessary for public use, and when just compensation is made to its owner. Another form is that of the *destruction of private property* by the State in the exercise of its police powers; as, for example, to stay a conflagration or remove a nuisance to public health. In cases of necessity the State is doubtless warranted in such destruction; either upon the ground that under extreme circumstances the objects lose their character as property and are no longer entitled to protection; or in obedience to the principle that when a private and a public interest are in conflict the private interest must always yield. But the necessity in such cases must be apparent and inexorable, and even then it may be doubted whether justice and the true

spirit of our laws do not require a compensation to the owner of the property unless he has been himself in fault. The levy of a specific sum upon the owner of property in proportion to its value is *taxation*, and this includes all forms of duties, imposts, excises, and other assessments regularly laid and collected for public purposes. Under the American constitutions all arbitrary levies upon individuals or classes of the people, all assessments for private purposes, and all taxation which does not rest upon the principle that public burdens ought to be borne equally by the whole people, or does not in practical effect approximate to that equality of distribution, are invalid. With reference to its liability to taxation property includes not only existing things, corporeal and incorporeal, but all agencies and enterprises intended and calculated to result in the production of property; and on this ground trades, professions, and even the polls or personal energies of individuals are taxable.

Rem. What property shall be taxed, and to what extent and in what method, every State through its legislative body decides for itself, subject to its constitutional restrictions. The Federal Constitution requires that *direct taxes*, — or taxes upon polls or land or personal property or upon the income of real or personal property, — when levied by the United States, shall be apportioned among the individual States according to the number of their representatives in Congress. It also provides that *indirect taxes* — or duties upon imports from foreign countries — may be levied by the United States at its discretion; but that the individual States shall lay no taxes upon exports or imports without the consent of Congress. The constitutions of the different States vary in their restrictions, but with a general tendency to leave the entire matter of taxation, as far as practicable, to the current discretion of the legislature. Neither the States nor the United States can tax, indirectly or directly, the governmental property or machinery of one another, such as the salaries of officers or the franchises of public corporations. The *assessment of benefits* for local improvements upon the owners of the neighboring property, though an exercise in part at least of the taxing power, is not strictly taxation, but rather an interference of the State to adjust the mutual relations of owners of property under circumstances which impose on them a common burden, but where their concerted action is impossible. The property of aliens, equally with that of citizens, is subject to police powers, assessments, taxation, and eminent domain.

READ: 1 Bl. Com., pp. 308–337;
3 Bl. Com., pp. 257–265;
Cooley, Const. Law, pp. 55–64, 363–377;
Cooley, Const. Lim., pp. 678–826;
Hare, Const. Law, pp. 241–422;
Miller on the Constitution, pp. 227–261;
Marshall's Decisions, pp. 339–351 (5 Wheat. 317–325).

§ 428. Of the Rights of the Collective People against the State.

The only *right of the collective people* against the State is the right of revolution; all other rights against the State reside in individual subjects and are enforcible on their behalf. The *right of revolution* is the right of the people to change the governmental system of the State. This right is fundamental and inalienable, and rests on the nature of a political society and its necessary relations to the persons of whom it is composed. It resides in the people *collectively* and cannot be exercised by any number less than the whole. It is exercised by the whole when they act by a lawful majority, or when the action of a part is accepted as a finality by the rest. To the collective people only citizens belong; an alien cannot rightfully participate in a revolution. A revolution may involve the entire governmental system of the State or any one of its integral portions, and may be either peaceable or by force of arms. A *peaceable revolution* is effected when the people, by the ordinary methods of deliberation and decision, change the framework of their government. A *forcible revolution* begins as a rebellion against the existing government, rendering its promoters guilty of the crime of treason; but if successful it becomes a revolution, and liability for the treason vanishes with the disappearance of the government against which it was committed. In every forcible revolution the actors assume the risk of failure and their consequent punishment, but in every form of State an emergency is likely to arise where the people are confronted with the alternative of armed resistance or the loss of liberty. A forcible revolution is subject to no limitations. If it succeeds, all laws and constitutions based upon the delegated sovereignty of the former State are *ipso facto* abrogated, and all sovereignty is revested in the collective people who may then create a new governmental system without reference to the old.

Rem. In the governments of the United States, and in the individual States of the American Union, a peaceable revolution is accomplished by altering their respective constitutions in the manner provided by the constitutions themselves. The Federal Constitution can thus be amended to any extent, even to the abolition of the present form of government and the substitution of any other in its stead. The individual States are limited in their revolutionary action by the Federal Constitution. Unless that constitution is first amended, by the act of the entire people of the United States, the people of an individual State cannot so modify their own State constitution as to depart from the republican form of government, or to withdraw from the Union, or to usurp any of the powers reserved to the United States, or to invade the personal rights guaranteed to all the people by the Federal Constitution.

READ: 1 Bl. Com., pp. 160–162;
1 Woolsey, Political Science, pp. 402–430;
Davis, Int. Law, p. 43;
Cooley, Const. Law, pp. 24–26;
Story on the Constitution, §§ 1813–1831.

§ 429. Of the Rights of Individual Subjects against the State: the Right to Protection.

The *rights of individual subjects* against the State are: (1) The right to Protection; and (2) The right to Redress. These rights belong to the subject by virtue of that tie of allegiance which binds him to the State, and measure the obligations toward him which the State assumed in that original compact whereby they became politically related to each other. The *right to protection* includes the right to protection against wrongs at the hands of co-subjects; the right to protection against wrongs at the hands of the State itself or its governmental agents; and the right to protection against wrongs at the hands of foreign States, their officers and citizens. As the State is organized for the purpose of securing the natural rights of its citizens, and as the sole consideration offered to the citizen for the surrender of his individual and inherent authority to protect his rights by force is the undertaking of the State to discharge that function on his behalf, so it is the manifest and *inexorable duty of the State* to enact laws defining and asserting all such rights, and prohibiting their violation by any other person who may be subject to its jurisdiction. Again, all wrongs committed

by a State or its governmental agents against its citizens originate either in its defective constitution, or in a usurpation or abuse of power. If the constitution of a State is not adapted to the requirements of its people, the more faithfully it is administered the more grievous is the infringement of their rights. The remedy in this case lies with the people who, by the *amendment of their constitution*, can escape from further injury. Usurpations and abuses of power by governmental agents are practically unpreventable by prohibitory laws, but the inducements to them may be so far removed by wise legislation that neither for personal or political ends they will be undertaken. Again, wrongs may be committed by one State against a citizen of another State either by its direct governmental act, or through its public officers, or by sanctioning and thereby adopting a wrong inflicted on him by its own subjects. A tort or crime perpetrated by the subject of one State against the citizen of another State is, in its inception, a mere private wrong against which the injured party is entitled to the same protection and redress as if both he and the wrongdoer were co-subjects of the State in which the wrong has been committed. But when the injured party, seeking the vindication of his right in the manner customary in that country of which the offender is a citizen, is there unlawfully denied redress, the wrong becomes the *act of the foreign State* itself by virtue of the sanction which it thus receives. Against such adopted wrongs, as well as against those directly inflicted by a foreign State or its official agents, it is the duty of every State to protect its own citizens by maintaining against other States a firm and persistent policy, — not only demanding their recognition of the rights of its citizens, but also compelling satisfaction for their wrongs.

Rem. Natural rights become legal rights through their definition and enforcement by the action of the State; and therefore wherever the natural rights of the subject are not fully protected the fault lies with the governmental system of the State, or with its administration, and is discoverable either in the laws of the State or in their mode of execution. In every popular or representative government the responsibility for such conditions rests upon the people who can, if they will, amend their laws and select proper officers for their enforcement.

READ: 1 Bl. Com., pp. 52, 53;
Rob. Am. Jur., §§ 167–170;
Cooley, Const. Law, pp. 224–250, 252–267, 294–309;
Cooley, Const. Lim., pp. 596–677;
Story on the Constitution, §§ 1857–1905;
Bryant on the Constitution, pp. 330–342;
Morse on Citizenship, §§ 131–206;
Webster on Citizenship, pp. 162–180.

§ 430. Of the Rights of Individual Subjects against the State: the Right to Redress.

The *right to redress* is the necessary complement of the right to protection, and where protection fails it is the duty of the State to provide and apply a remedy for the injuries which it has been unable to prevent. By entering into political society, and uniting with other individuals to form the State, the citizen also waives his natural right to seek a forcible remedy for injuries, except in a few extreme emergencies, and renders himself dependent on the State for his redress. This *redress the State* is, therefore, under a *supreme obligation to afford*. In modern States redress for injuries committed by co-subjects is usually awarded against the person or property of the wrongdoer, through the agency of certain tribunals which can inquire into the nature of the injury; its cause, extent, and consequences; and determine what and by whom compensation must be made. Hence it is the *duty of the State* to establish a sufficient number of these tribunals, easily accessible to the people, in which relief can be obtained with certainty, with justice, and without unnecessary expense or delay. It is also the duty of the State to provide by appropriate legislation against fraudulent concealments of person or property tending to defeat the ends of justice, and to inflict public penalties for wrongs which in their nature are grievously injurious or are of dangerous example. *Wrongs committed by the State* through its governmental agents, when in their nature they are torts or crimes, are redressed by the courts in actions or prosecutions against the offending parties, in the same manner as in wrongs inflicted by co-subjects. The State itself, however, is *not amenable to suit* for any wrong, except by its own consent, nor is it liable for the misconduct of its officers. The remedy for the injured party, in such cases, is to petition for redress;

and if this is refused no further relief is obtainable. When damage is occasioned by public officers, acting within the scope of their authority, or in obedience to the lawful commands of their legitimate superiors, no legal obligation to afford a remedy rests upon the State because no legal wrong has been committed, although it may make compensation to the injured party on the ground of natural justice. Against *oppressive legislation* there is also no direct redress unless it transcends the constitutional powers of the legislative body, and on that account can be declared invalid by the courts. Should all departments of the government combine against the citizen, nothing remains except to wait until the wrong becomes so serious and universal as to warrant and provoke the exercise of the right of revolution. The *wrongs committed by* the subjects of one State against the citizens of *another State*, being as between the parties merely private wrongs, the remedy therefor is to be sought, in the first instance, in the courts having jurisdiction over the parties and the subject-matter of the controversy. If such jurisdiction resides only in the courts of the State of which the wrongdoer is a citizen, and they deny to the injured party the relief which it is their custom to afford in such cases, and the wrong thus becomes adopted by the foreign State, it is the duty of the State of which the injured party is a citizen to demand directly from the foreign State a reparation for the injury, and to enforce its demand, if necessary, by war. This also is the only remedy when the citizen of one State is injured by the direct action of a foreign State.

Rem. The foregoing rights belong in their widest extent to the *citizen alone*. Complete protection and vindication in all his legal rights, at all times, in all places, and at all hazards, are due to him; and the State which withholds these breaks the compact out of which its own existence sprang, and is unfaithful to its obligations to its citizens. The *resident alien*, on the other hand, has no right to protection or redress against a foreign State, except from the State to which he owes a natural allegiance. If he is an alien friend the State where he resides is bound to protect him against wrongs from itself and its own subjects, and to afford to him the usual remedies in local courts of justice. If he becomes an alien enemy these rights, as a matter of strict law, are suspended; but long established custom recognizes his natural

right to be treated as an alien friend until he manifests his personal hostility toward the State, or is formally notified to leave its territory.

READ: 3 Bl. Com., pp. 254–257;
Wharton, Int. Law, §§ 189, 190, 201–207;
Woolsey, Int. Law, §§ 65–70;
Webster on Citizenship, pp. 289–295.

CHAPTER II

OF THE LAW OF EXTERNAL SOVEREIGNTY: INTERNATIONAL LAW

§ 431. Of the Nature of External Sovereignty.

External sovereignty consists of those powers which sovereign States may rightfully exercise with reference to other sovereign States, or toward those territories, persons, or communities which are not embraced within the jurisdiction of any sovereign State. These *powers may originate* either: (1) In the inherent character of a sovereign State, as such; or (2) In the essential relations, voluntarily established between it and the other members of the family of nations; or (3) In the rules and usages of international law; or (4) In the principles and precepts of the natural law. That ingredient of external sovereignty which originates in the inherent character of a sovereign State, as such, is its *independence* of all exterior political control; since a sovereign State can have no superior by whom it is directed or to whom it is accountable. That ingredient which is derived from the relations, voluntarily established between it and the other members of the family of nations, is its *political equality* with each and all of them. Those ingredients of external sovereignty which are created by the rules and usages of international law vary with the development of that body of law, and affect only the members of the family of nations in their reciprocal relations with one another. Those ingredients which rest upon the principles and precepts of the natural law comprise the rights of the State against political communities and unorganized populations which are not within the family of nations, and against the members of that family in emergencies for which the rules of international law do not provide.

Rem. Political equality does not depend upon the size or strength or antiquity of a State, nor does it arise *ipso facto* out of

its independence, but results from its admission into the family of nations. The "*family of nations*" is composed of those States which, in the course of ages, have come to recognize one another as coequal sovereignties, and have adopted as the measure of their mutual obligations the rules which constitute the international law. Formerly the Christian States alone were embraced within this family, but with the extension of modern commerce others have from time to time been admitted. Prior to such admission political communities have no national rights against the family of nations, or any of its members, except those which they have the physical ability to maintain; and are neither governed nor protected by the rules of international law. By their admission they become politically equal to the other members of the family in all the attributes of sovereignty, both external and internal, and are governed by the rules of international as well as natural law. *Natural law* is the law of reason and justice, and is binding on both States and individuals. That nations in the indulgence of their selfish lusts or political ambitions sometimes depart therefrom, especially in their dealings with weak communities outside the family of nations, neither enlarges their legitimate rights nor restricts their public duties.

READ: 1 Kent Com., Lect. ii, pp. 21–23;
Walker, American Law, §§ 295–302;
Wharton, American Law, §§ 140–145;
Wheaton, Int. Law, §§ 22, 77–94, 152, 158;
Wharton, Int. Law, § 1;
Woolsey, Int. Law, §§ 1–8, 9–17, 36, 37, 52;
Pomeroy, Int. Law, §§ 47–58;
Glenn, Int. Law, §§ 1–4, 19, 24, 32;
Davis, Int. Law, pp. 1–29, 34–36, 39;
Moore, Int. Law, §§ 3, 4, 24.

§ 432. Of Complete and Incomplete External Sovereignty.

Although theoretically incapable of limitation the external sovereignty of a State may practically be incomplete. Thus while certain States are entirely independent and coequal, possessing and enjoying in its fulness every ingredient of external sovereignty, some States have voluntarily surrendered a portion of their powers and entered into relations with other States which, for the time at least, restrict their own external sovereignty. These modifications of external sovereignty have frequently arisen, and may at any time be reproduced by the necessities of peaceful States, or the uncertain influence of war.

Rem. Instances of this restriction of external sovereignty occur where States combine into a *federal union*, and delegate external sovereignty to the new State which they compose; or where States form an *alliance* and confer upon some central authority the sole right to negotiate treaties, make peace, and declare war; or where one State assumes a *protectorate* over another at the request of the protected State or of the family of nations, and so exercises on its behalf the power of peace or war; or where the family of nations determines that certain weaker States shall, for their own sake, always be regarded as *neutral nations* in case of war, and neither share in its operations nor participate in its results.

READ: Wheaton, Int. Law, §§ 33–59;
Woolsey, Int. Law, § 37;
Pomeroy, Int. Law, §§ 59–66;
Glenn, Int. Law, §§ 12–18;
Davis, Int. Law, pp. 37–39;
Moore, Int. Law, §§ 5–18.

§ 433. Of the Territorial Limits of External Sovereignty.

The *external sovereignty* of every independent State extends to all parts of the globe which are not subject to the internal sovereignty of some particular State. With reference to this question the surface of the *earth* may be considered as *divisible into three portions* according to their several political conditions: (1) That over which there is no internal sovereignty, and in which the external sovereignty of all independent nations is coequal and complete; (2) That over which there is complete internal sovereignty, and consequently no external sovereignty; (3) That over which internal sovereignty exists but is not complete, and yields in certain matters to the external sovereignty of other States. The first portion includes the high seas, and whatever land remains unoccupied by organized political communities. The second portion comprises all the territory lying within the physical boundaries of the individual States, with the exception of the great waterways leading through them to other States and the localities within them occupied by a foreign sovereign or his armies or ambassadors; as also their public vessels wherever they may be, and their private vessels when not in foreign ports. The third portion covers so much of the ocean and its inlets as lies within a marine league or cannon shot of the coast line of any

State; the great natural waterways leading from ocean to ocean, or from one State to the ocean through the territory of another State; and the localities in one State occupied by the sovereigns of other States when traveling abroad, or by their ambassadors, or by their armies when in transit through its territory.

Rem. The divided sovereignty in this third portion enables a State to protect itself against the advance of enemies by sea or the violations of its domestic laws within a league from its own shores, and to enforce its authority against its subjects in all parts of its dominions; while at the same time it leaves open to all other States the avenues of commerce, and clothes them with authority over their diplomatic representatives, and their military and naval forces, though temporarily within the confines of another State. The rights and duties contained within the complete external sovereignty of independent nations in the first portion of the earth and their incomplete external sovereignty in the third portion, together with its effect upon the internal sovereignty which it qualifies, as well as all other interstate relations, are defined and governed by the rules of international law.

READ: 1 Kent Com., Lect. ii, pp. 26–36;
Wheaton, Int. Law, §§ 99–113, 177–205;
Wharton, Int. Law, §§ 11 *a*, 13, 15, 17, 17 *a*, 20, 22–32, 33 *a*–39, 287–308, 408–410;
Woolsey, Int. Law, §§ 53, 56–62, 171;
Pomeroy, Int. Law, §§ 125–158, 166–174, 177–187;
Glenn, Int. Law, §§ 41–47, 56–60, 71, 72;
Davis, Int. Law, pp. 44–65, 69–85;
Moore, Int. Law, §§ 125–174, 197–208, 251–261, 308.

§ 434. Of International Law.

The law which defines and enforces international rights and duties proceeds from no political superior, but derives its authority from the common consent of all the States within the family of nations. Its obligations, though thus voluntarily assumed, cannot, however, be repudiated by any State, without forfeiting its place in the national family and possibly subjecting itself to punishment or even dissolution by the other States. This law is also made a part of the domestic law of every State, and operates directly on its citizens. Its provisions are not formally set forth in any code or body of laws, but exist in customs, usages, and generally accepted principles of conduct; and are expressed in

words in the treatises of jurists, the decisions of courts, in State papers, and in treaties. Uniform throughout all the States whose circumstances are identical, it varies with their friendly or hostile attitude toward one another, and hence is properly divided into: (1) The Laws of Peace; and (2) The Laws of War.

Rem. International law has no relation to political communities outside the family of nations except through its effect upon the States within the family; and neither binds them nor protects them, but leaves them to be dealt with by each State according to the law of nature, subject to such restrictions only as the interests of the States within the family impose. Nor does it include the special conventions and agreements made between two or more of the States within the family as to their reciprocal obligations, since these are binding on no other State, nor on the actions of the family at large.

READ: 1 Kent Com., Lect. i, pp. 1–20;
Wheaton, Int. Law, §§ 1–15;
Wharton, Int. Law, §§ 8, 9;
Woolsey, Int. Law, §§ 26–35, 222–231;
Pomeroy, Int. Law, §§ 1–46;
Glenn, Int. Law, §§ 5–7;
Moore, Int. Law, §§ 1, 2.

SECTION I

OF THE RECIPROCAL RIGHTS AND DUTIES OF STATES IN TIMES OF PEACE

§ 435. Of the Creation of New States, and their Admission into the Family of Nations.

New *States may arise* either: (1) By the organization into a political community of a population hitherto unattached to any State; or (2) By the division of an existing State into two or more States; or (3) By the combination of two or more existing States into a new State; or (4) By the successful rebellion of the people of a State against the existing governmental system, or any other form of revolution which results in the substitution of a new State for the old. Whenever, in any of these methods, a political society originates which is in fact wholly independent of any superior State, and is apparently able to maintain its

independence, it is a proper subject for admission to the family of nations. Such admission is not, however, a matter of right, but rests in the discretion and depends on the consent of the members of the national family; and their decision must be governed by considerations relating to their own political, moral, and commercial interests. In determining upon the admission of any particular State no attention is paid to the legality or illegality of its origin; if it is *de facto* an independent State, and international policy demands its recognition, the claims of sovereignties from which it has seceded will be ignored. The *recognition of a new State* may be made by mutual treaties between it and the other States, or by the interchange of ambassadors, or by express declaration.

Rem. The *effect of the formation of a new State* upon the rights and duties of the State, from which it was derived, vary with the mode of its production. Where a new State is formed from an old one, by a process in which the old State disappears, the international rights and obligations of the old State continue in the new. Where a new State is severed from a parent State, which still preserves its identity, the international rights and duties of the parent State survive in it alone, unless they are peculiar to that portion of the territory of the parent State over which the new State has acquired exclusive sovereignty. When an old State is entirely divided into several new ones, each becomes a sharer in the former international rights and obligations in a proportion measured by its territory, population, agreement with the remaining subdivisions, or other circumstantial standards. Where one existing State is absorbed into another the latter State is clothed with the rights and assumes the duties of the other, so far as they are consistent with its own constitution. Mere private rights are not affected by a change in sovereignty.

READ: Wheaton, Int. Law, §§ 28–32;
Wharton, Int. Law, §§ 6, 10, 70, 71;
Woolsey, Int. Law, §§ 38–41;
Pomeroy, Int. Law, §§ 67–77, 215–223 240–249;
Glenn, Int. Law, §§ 8–11, 25–29;
Davis, Int. Law, pp. 31–34, 41–43;
Moore, Int. Law, §§ 19, 20, 22, 27–58, 76–79, 90–124.

§ 436. Of the Right of a State to Acquire New Territory.

The rules of international law permit a State to *acquire new territory:* (1) By discovery and beneficial occupation; (2) By

purchase; (3) By peaceful and voluntary cession; (4) By conquest as a result of justifiable war. A *title by discovery and beneficial occupation* can arise only in reference to territory not already occupied, or occupied by vagrant populations not yet organized into a State. A *beneficial occupation* is an occupation for a useful purpose, — as for a trading post, a fishing station, or an agricultural settlement. It must have been authorized or sanctioned by the State in which it creates title, and must be continued long enough to manifest the intention of that State to make the occupied locality a permanent part of its own territory. The area covered by this title comprises all the land actually occupied and controlled by the new colony, together with all that may be naturally incidental to it or necessary to its security. A *title by purchase or by voluntary cession* is based upon a contract between the ceding and the receiving States, either for valuable consideration as in the case of a purchase, or in the readjustment of political relations as in the case of voluntary cession. To render a title by purchase valid each of the States must, by its constitution, have possessed the right to engage in such transactions. A voluntary cession made to procure the termination of a war is within the ordinary powers of sovereign States; a cession in times of peace is held by some authorities to require the consent of the inhabitants of the ceded territory. A *title by conquest* is legitimate when the territory is acquired in the progress of a righteous war, and is necessary for the protection of the victor State or as compensation for the wrongs it has sustained. The transfer of territory from one State to another, by any of these methods, is without prejudice to the personal and property rights of its inhabitants, and former laws remain in force until supplanted by new legislation.

Rem. The once asserted doctrine that mere discovery of new territory forms a ground of ownership, irrespective of continued occupation and enjoyment, was long since exploded. A title claimed by virtue of a conquest, resulting from a war waged simply for the purpose of territorial aggrandizement, also no longer receives recognition under the rules of international law. Modern ideas conform to the universal principles that occupation for use is the true foundation of every title, and that self-defence and fair reprisal are consonant with justice; while robbery in every form, whether by States or individuals, is always wrong.

READ: 1 Kent Com., Lect. viii, pp. 177–179;
3 Kent Com., Lect. li, pp. 377–399;
Wheaton, Int. Law, §§ 165, 166;
Wharton, Int. Law, §§ 2, 4–5 *a*, 11;
Woolsey, Int. Law, §§ 21, 54, 55;
Pomeroy, Int. Law, §§ 91–124, 165;
Glenn, Int. Law, §§ 31, 34–40;
Davis, Int. Law, pp. 66, 67, 345–349;
Moore, Int. Law, §§ 25, 80–89;
Story on the Constitution, §§ 1–38.

§ 437. Of Political and Commercial Intercourse between Sovereign States: Intercourse through Sovereigns in Person.

An independent State undoubtedly has the right, in theory at least, to hold itself aloof from other States, and refuse to enter into political or commercial intercourse with them. On its practical side, however, this right is subject to certain qualifications. By the law of nature the earth as a whole belongs to the human race as a whole; and any natural object which is indispensable to mankind, although contained entirely within the territory of a single State, is not so far under its sole dominion but that, if the quantity is greater than it needs, other nations can reasonably and justly claim a share in its advantages. Hence it has been held that every State, which has such articles at its command, is bound to permit other States to traffic in them by the usual methods of commercial intercourse, and that to refuse this privilege is a hostile act. Again, no State can lawfully prohibit the use of intersecting water-ways leading to other States, or that incidental communication with its own people which such use necessitates. Nor can one State, which has already established commercial or political relations with other States, withdraw therefrom without their consent; nor exclude their governmental agents or their duly certified subjects without submitting its reasons for such exclusion to their consideration. A State which, in view of these conditions, is free to refuse intercourse with other States, and does so, thereby cuts itself off from the family of nations, and is neither protected nor controlled by the provisions of international law.

Rem. Political intercourse between sovereign States is formally carried on through diplomatic agents, but may take place through the persons of the sovereigns themselves. When the

sovereign is present in *his official capacity* in another State he is regarded as still within his own dominions, and as enjoying all his royal prerogatives. His person is inviolable, and neither he nor his retinue are bound by the local laws. He cannot interfere with local affairs, nor assert his own sovereignty except according to the laws of his own State and against the members of his own train. He is entitled to the courtesies prescribed by the rules of international etiquette, although he may at any time be requested to depart by the sovereign of the entertaining State. The immunities attached to him extend to the house in which he resides, and to the vessels or other vehicles on which he may be transported. A sovereign traveling in foreign countries *incognito*, or as a *private person*, submits himself to the local jurisdiction, but may at will disclose his official character and claim its legal privileges.

READ: Wheaton, Int. Law, §§ 95–97;
Woolsey, Int. Law, §§ 25, 63–70;
Pomeroy, Int. Law, §§ 159–164, 175;
Glenn, Int. Law, § 48;
Davis, Int. Law, pp. 85–87, 122–124;
Moore, Int. Law, § 250.

§ 438. Of Political Intercourse between Sovereign States through Ambassadors and Ministers.

Diplomatic agents are of great variety, but may be divided into these general classes: (1) Those through whom political intercourse is carried on between two sovereign States; (2) Those through whom such intercourse is carried on between political communities, one of which is not a sovereign State; (3) Those through whom intercourse, both commercial and political, is carried on in foreign countries, between the citizens of the State they represent and their own State, or the foreign State or its resident citizens. Diplomatic agents of the first class are known as ambassadors or ministers. An *ambassador* is accredited directly from one sovereign to the other, and on presenting his credentials must be received as the representative of his own sovereign unless the sovereignty he represents is doubtful, as in the case of civil war; or unless his mission is inconsistent with the dignity or interests of the State to which he is sent; or unless he is himself a person against whose presence within its borders, in his proposed capacity, that State has some reasonable objection. While within the State to which he is accredited *he and his household are ex-*

empt from its civil and criminal jurisdiction; are entitled to protection against personal interference; and are to be treated with the deference which international etiquette requires. His *official residence*, and the personal property incidental thereto, are free from local taxes and from police supervision, though he has no right to employ them for the refuge of criminals other than those of his own family. For grievous offences against the local law, or against good morals, *he may be remanded* to his own sovereign for trial, and may himself send home for that purpose any of his household who violate the law. The *official authority* of an ambassador is *terminated* by his recall by his own State; or by his dismissal by the State to which he is accredited; or by war between the States; or by the death of his own sovereign; or by the dissolution of his State; or by the fulfilment of his mission; or by the expiration of the time for which he was appointed. In *his transit through other States*, with which his own State is at peace, his personal and property rights must be respected, even when such States are hostile to the State to which he has been sent; but he has no right of passage through States with which his own State is at war.

Rem. The privileges and duties of ambassadors are shared by other public ministers who are accredited directly by one sovereign to another, as the formal medium of their political intercourse. Public ministers who are charged with an inferior or special mission enjoy such immunities as their credentials demand.

READ: 1 Bl. Com., pp. 253–256;
1 Kent Com., Lect. ii, pp. 38–41;
Wheaton, Int. Law, §§ 98, 206–251;
Wharton, Int. Law, §§ 78–110;
Woolsey, Int. Law, §§ 86–98;
Pomeroy, Int. Law, §§ 176, 316–369;
Glenn, Int. Law, §§ 49–55, 78–84;
Davis, Int. Law, pp. 87, 88, 190–210;
Moore, Int. Law, §§ 623–695.

§ 439. Of Political and Commercial Intercourse between Sovereign States through Commissioners, Consuls, and Resident Aliens.

Occasions sometimes arise when political intercourse becomes necessary between communities one of which is not a

sovereign State, as between a colony and the mother country, or between a revolutionary government and a foreign State. The agents employed for this purpose, on the part of the dependent or as yet unrecognized community, are known by various names, and are sometimes called commissioners. The State to which a *commissioner* is accredited is under no obligation to receive him, and even when he is received he is not entitled to the immunities which attach to the representatives of sovereign powers. If he is sent by a rebellious colony to the parent State, without a pledge of safeguard from the government, he is liable to arrest and punishment as a traitor. But it is optional with any State to treat such a messenger with courtesy, to allow him a respectful hearing, and to grant him such local exemptions as are compatible with his official errand. *Consuls* are governmental agents who reside abroad to protect citizens of their own States in foreign countries. The interests committed to them are manifold, some relating to commerce, others to the political welfare of their own States. Among their duties, which are prescribed by treaties or by the laws of their own States, are the issuing of certificates, marine protests, passports, and other official documents; the care of distressed seamen and of the estates of deceased citizens of their own State; the decision of controversies between their own citizens; and the reporting to their own State of any information they possess which may promote its welfare. Consuls may be citizens either of the State they represent, or of the State where they reside. They are appointed by commission or patent, and on presenting their credentials to the foreign government they receive an *exequatur*, authorizing them to perform consular functions in the locality to which they have been set. This *exequatur* may be recalled and the consul dismissed for illegal conduct; and for an offence against the local law he can either be punished abroad or be expelled from the country. He enjoys no diplomatic immunities like those of an ambassador, but is usually exempt from arrest on political grounds, from personal taxes, and from military and jury duty; and in the event of war between the State of his residence and other foreign States he is entitled to protection from the combatants, both as to his person and his abode.

Rem. A *resident alien*, though in no proper sense a political representative of his own State, can by many of his actions and voluntary conditions bring it under certain obligations. A State which permits the citizens of other States to enter its territory is bound to protect their persons and property, and to enact and enforce laws sufficient for that purpose; and if it fails to do this it becomes liable for any violation of their rights either by its governmental agents or by its own citizens. It is not, however, responsible for the consequences of a sudden outbreak by a mob, or an insurrection which it could not be expected to foresee or prevent. Resident aliens are subject to the local laws, except when they impose duties inconsistent with their local allegiance to their own States, or when conformity to them requires political qualifications which aliens do not possess. They are *exempt* from military duty unless in an emergency created by an attack of savages or pirates, or when called upon to aid in the enforcement of necessary police regulations. Every State also owes to the *shipwrecked mariners* of any nation, and to other persons cast helpless and destitute upon its shores, the duties dictated by ordinary humanity.

READ: 1 Kent Com., Lect. ii, pp. 41–45;
Wheaton, Int. Law, §§ 110, 216;
Wharton, Int. Law, §§ 113–125;
Woolsey, Int. Law, §§ 99–100;
Pomeroy, Int. Law, §§ 370–385;
Glenn, Int. Law, §§ 85–90;
Davis, Int. Law, pp. 88, 211–218;
Moore, Int. Law, §§ 627, 628, 696–733.

§ 440. Of Intercourse between Sovereign States: Treaties: International Etiquette.

A *treaty* is a compact between two or more sovereign States. It is generally framed and signed by commissioners appointed by the States, and then submitted to the respective States for ratification. If ratified it becomes operative from the date of signature. The *subject-matter of a treaty* may be any action, forbearance, or relation which the signatory States have the constitutional and international right to undertake. It may be in aid of commercial or political interests; or to secure the treaty States against the aggressions of other States; or to preserve neutrality in case of war; or to form an alliance against all other States; or to guarantee to one of the States certain rights against a third. A *treaty is invalid* when procured by force or fraud; and may be rescinded

by mutual agreement, or expire by lapse of time, or by the completion of its purpose, or by the occurrence of conditions which render its further execution impossible. War between the parties may suspend but does not necessarily abrogate a treaty, and unless it is in some other manner terminated it may revive at the return of peace. A valid *treaty is binding* upon the respective States as long as it exists, and any breach of it is a sufficient ground for retorsion, reprisal, or in the last resort for war. It is also binding upon all the citizens of the signatory States, and as to them is interpreted and enforced in the same manner as their other local laws. In the United States a treaty is of the same authority as an Act of Congress, and when a conflict arises between them the latest must prevail.

Rem. Intercourse between sovereign States is necessarily conducted with some degree of formality; and for a guide in its observance certain ceremonial rules have been adopted by the family of nations which every State, and all its people, are obliged by courtesy and fraternal duty to obey. These rules constitute the social order known as "*international etiquette.*" They govern the modes of recognition accorded to foreign sovereigns and their diplomatic agents; their rights of precedence; their methods of transacting public business; the honors paid to their military and naval representatives; the friendly greeting of their ships at sea; their interchanges of congratulations and condolences; and many other lines of conduct whose polite and kindly aspect goes so far to promote international harmony and peace. Trivial as some of these observances may seem, a breach of them is a serious offence against the law of nations, and has sometimes been treated as a sufficient cause for war.

READ: 1 Kent Com., Lect. ii, pp. 25, 26; Lect. iii, pp. 49–51; Lect. ix, pp. 181–183;
Wheaton, Int. Law, §§ 160, 252, 253, 256–289;
Wharton, Int. Law, §§ 130–139;
Woolsey, Int. Law, §§ 81–85, 101–113;
Pomeroy, Int. Law, §§ 250–315;
Glenn, Int. Law, §§ 100–112;
Davis, Int. Law, pp. 124–133, 223–248;
Moore, Int. Law, §§ 734–780.

§ 441. Of the Right of Intervention.

Notwithstanding the admitted independence of every State within the family of nations, international law recognizes the

right of one State to *interfere* in the affairs of another when necessary for its own protection, even although it has as yet received no such provocation as could be regarded as a cause of war. Thus where a group of contiguous States are so nearly equal to one another in military resources that the unusual development of one might endanger the safety of the rest, they may intervene by protest and, if necessary, by force to prevent the *balance of power* from being disturbed. Or where one of two friendly nations fails to suppress hostile demonstrations on its own territory against the other, by persons under its own jurisdiction, the latter nation may by its own act compel them to desist. One State can also, if requested, aid another State in quelling insurrections, but cannot give assistance to persons who are in revolt against the established government of a friendly State, unless prepared to recognize the insurgents as an independent political community. Any State may offer its friendly service as *mediator* to two or more other States, between whom controversies have arisen.

Rem. Whether one State can interfere with another in its dealings with its own subjects, on the ground of inhumanity or religious persecution, is doubtful. In instances in which this has in fact occurred some other reason, such as self-preservation or the protection of its own citizens, has usually been offered by the intervening State; or it has acted with the consent of all the other States, and in a manner as their agent, to prevent wrongs too flagrant for the universal sense of natural justice to endure.

READ: 1 Kent Com., Lect. ii, pp. 23–25;
Wheaton, Int. Law, §§ 63–76;
Wharton, Int. Law, §§ 45–68 *a*;
Woolsey, Int. Law, §§ 42–51;
Pomeroy, Int. Law, §§ 202, 203;
Glenn, Int. Law, § 91;
Davis, Int. Law, pp. 98–115;
Moore, Int. Law, §§ 897–1063.

§ 442. Of Belligerent Rights.

Belligerent rights are certain privileges which are conceded to insurgents either by their own States or by foreign States. A *rebel*, considered merely as such, is at once a citizen of and a traitor against his own State. As a traitor he is liable to arrest and punishment for his crime. As a citizen his own

State is liable for the wrongs committed by him against other States and their citizens notwithstanding its inability, on account of his rebellion, to prevent them. By conceding to him belligerent rights his own State at once relieves itself from responsibility to other States for his injurious acts, and for such of its own agreements as his rebellion renders it unable to fulfil; and confers upon him a *quasi*-political character by virtue of which he becomes subject to and is protected by the laws of war. Though not emancipated from his allegiance to his own State, he then becomes qualified to treat with it as a hostile power for the exchange of prisoners or for terms of peace, and may negotiate with foreign States for the borrowing of money or the purchase of supplies. He is also warranted in pursuing ordinary warlike measures, such as commissioning war vessels under his own flag, blockading ports, or exercising the customary authority over neutral commerce. The *concession of belligerent rights by a foreign State* affects the conceding State, the insurgents, and their parent State; compelling the parent State to recognize the conceding State as a neutral between the two hostile powers, with the same rights and liabilities which a concession by the parent State would create as to the whole family of nations. To justify a foreign State in making this concession an actual civil war must be in progress, directed against the existing government by an organized political community which observes international usages and has a reasonable prospect of ultimate success; and the conceding State must because of its proximity to the parent State, or the danger to its commerce from the lawless acts of the contending factions, be liable to injury unless its status and that of the parties to the conflict are settled by those rules of international law which protect neutral States in time of war.

Rem. Belligerent rights, once conceded, *cannot be withdrawn*, whatever inconvenience their enjoyment by the insurgents may occasion to the conceding States; but upon the suppression of the revolt they are extinguished, and do not revive in favor of another insurrection subsequently commenced. A *concession* of belligerent rights *by foreign States* affords no evidence of their intention to recognize the independence of the insurgent community. Before this can lawfully be done the attempt of the parent State to quell the rebellion must have ceased, and the actual independence of the insurgents must have been achieved

READ: Wheaton, Int. Law, §§ 22–27;
Wharton, Int. Law, §§ 7, 69, 350, 351;
Woolsey, Int. Law, §§ 143, 179–181;
Pomeroy, Int. Law, §§ 224–239;
Glenn, Int. Law, §§ 20–23;
Davis, Int. Law, pp. 276–278;
Moore, Int. Law, §§ 59–75.

§ 443. Of the Duties of Sovereign States toward Themselves and One Another.

Every State *owes to itself* the duty of protecting its own existence, its independence and its sovereignty, its reputation, its territory, its people, and its property; and when these are attacked it should defend them with all necessary force; and when they are injured it should demand and, if possible, compel redress. This duty in all its fulness is imposed by the law of nature, and is sanctioned and, in the general modes of its performance, regulated by international law. Every State is expected to be alert and unrelenting in the discharge of this duty, as the only method of preserving its own rights and those of its subjects against foreign aggression. Every State also *owes to all other friendly States* the duty to observe the rules of international law and the established usages and privileges of interstate relations; to prevent and punish injuries by its own subjects to their reputation and national honor; to repress conspiracies within its territory against their governments; to keep good faith in its political intercourse with them; to respect the decisions of their courts; to give effect in proper cases to their local laws; and to refuse shelter to fugitive offenders from their shores who have been guilty of gross moral wrongs. Some of these duties have been formulated in treaties; but all are founded on essential social conditions and derive their origin from the natural law.

Rem. Incidental to these primary international duties is the imperative obligation of each nation to keep itself in a *perpetual condition to perform them.* It is not optional with any sovereign State whether it will be weak or strong. It is its *duty to be strong* enough to discharge all its proper functions with adequate promptness and effect, and for that purpose to maintain its armies and navies and all the appliances of war on such a footing, even in times of peace, that it may be ready for any emergency which can arise.

READ: 1 Kent Com., Lect. iii, pp. 36–38, 47–49;
Wheaton, Int. Law, §§ 60–62, 115–120;
Wharton, Int. Law, §§ 16, 268–282;
Woolsey, Int. Law, §§ 18–20 *b*, 22–24, 75–80;
Pomeroy, Int. Law, §§ 76–90, 198–201, 204;
Glenn, Int. Law, §§ 30, 33, 62–70;
Davis, Int. Law, pp. 91–96, 116–122, 166–180;
Moore, Int. Law, §§ 23, 209–241, 579–622.

§ 444. Of the Causes of War and its Prevention.

The failure of one State to perform its legal duty toward another in any matter of political importance is a sufficient *cause for war*. Of this sufficiency the injured State must judge for itself, and if it appeals to arms the offending State has no alternative except to meet the issue which it has provoked. A *war is justified* not only by past offences, but by the immediate danger of an injury which force at once exerted may be able to prevent; or by political combinations between other States which give them an unreasonable advantage in the event of future conflict; or by an unwarrantable attack upon some other State in defiance of the general policy of the family of nations. In modern times the tendency to forestall threatened wrongs by preventive remedies has taken possession of all methods of redress; and nations claim and exercise the right to ward off, by a timely interference, the injuries which, if actually committed, might lead to long continued and disastrous war.

Rem. The fraternal spirit, prevailing throughout the family of nations, also encourages an offended nation to resort to milder methods of redress than that of actual war; and international law gives to these methods a definite form and sanction, in order to afford a just relief with the least possible injury to the offender. Most prominent among these measures is that of *arbitration*, where the contending States submit their controversy to the decision of a tribunal constituted by a treaty, and promise to abide by its decision. A second method is *retorsion*, whereby the injured State retaliates against the offender by inflicting upon it, or upon its subjects, the same wrong in species and in quantity which it has itself sustained. A third measure is *reprisal*, which consists in seizing the property of the offending State, either in satisfaction for the offence or as security for a compensation now demanded and expected to be hereafter made. Another remedy is *embargo*, or the detention in the harbors of the injured State of

private vessels, sailing under the flag of the offender, until the wrong complained of is redressed or the controversy culminates in war. A fifth method is a *pacific blockade* of the ports of the offender, interrupting its commerce, and seizing and sequestering such of its vessels as attempt to enter or leave their harbors, until the offending State is brought to terms of settlement, or the contest of endurance is superseded by open hostilities. In such blockades the right of *neutral States* must be respected, and the commerce of their subjects be allowed to pass and repass without molestation. These milder measures being ignored by the offended State, or having been applied by it without result, nothing remains to it except to waive its rights or submit them to the arbitrament of war.

READ: 1 Kent Com., Lect. iii, pp. 60, 61;
Wheaton, Int. Law, §§ 290–293;
Wharton, Int. Law, §§ 315–321, 364;
Woolsey, Int. Law, §§ 118, 119;
Glenn, Int. Law, §§ 113–120;
Davis, Int. Law, pp. 250–267;
Moore, Int. Law, §§ 1064–1099.

SECTION II

OF THE RECIPROCAL RIGHTS AND DUTIES OF STATES IN TIMES OF WAR

§ 445. Of War.

War is a condition of active armed hostility between two or more independent States, or between a parent State and its rebellious subjects to whom belligerent rights have been conceded. According to the principles now recognized by the family of nations a *war must have an adequate cause;* and it is customary at the commencement of a war for the attacking State to disclose this cause to other States and its own citizens, and to announce the purpose which it has in opening hostilities. It is not, however, bound by this announcement, but as the war progresses it may change its purpose as circumstances change, and at the termination of the war may insist upon concessions which it at first disclaimed. A formal *declaration of war*, once considered so important, is no longer necessary. The defending State has ample notice through its diplomatic agents of the impending crisis, and frequently an *ultimatum* issued by the attacking State demands redress within a definite time under the penalty of im-

mediate war. Neutral States and the subjects of the two contending nations have a right to a *sufficient warning* from the attacking State to enable them to take proper measures for their own protection before hostilities, which could affect them, are actually begun. The *breaking out of war* introduces a new element into the external sovereignty of every State within the national family. The States engaged in the conflict become subject to those rules of international law which govern the rights and duties of belligerents. Those not participating in the struggle are, in their relations to the contending States, subject to the rules which govern the rights and duties of neutrals; while in reference to one another they remain under the rules which control all nations in times of peace.

Rem. Conflicts between groups of people not forming political communities, or between a State and such a group, or between a State and a body of insurgents not posesssing belligerent rights, are *not war* in the sense of international law, although they may follow its methods and are governed by its rules; and with such conflicts States not immediately involved do not concern themselves unless they grossly violate the dictates of humanity.

READ: 1 Kent Com., Lect. iii, pp. 51–55;
Wheaton, Int. Law, §§ 294–297;
Wharton, Int. Law, §§ 333–335;
Woolsey, Int. Law, §§ 114–117, 120–122;
Glenn, Int. Law, §§ 121–129;
Davis, Int. Law, pp. 271–274, 279–281;
Moore, Int. Law, §§ 1100–1108.

ARTICLE I

OF THE RECIPROCAL RIGHTS AND DUTIES OF BELLIGERENTS

§ 446. Of the Effects of War upon the Mutual Relations of the Hostile States and of their Citizens.

The date of the commencement of the war, when not prescribed in some public announcement of the attacking State, is fixed by the occurrence of the first act of hostility; and thenceforward, until the formal restoration of peace, the States and their respective citizens are, in law, *enemies* to one another. As a result of this condition ordinary political intercourse between the

States, and commercial intercourse between their citizens, are both suspended. Diplomatic relations give place to the negotiations peculiar to a state of war; private contracts, unless licensed by the respective States, have no validity; and remedies on former private obligations are held in abeyance until the return of peace. Strictly speaking this condition should attach even to citizens of one of the contending States who are residing in the other, but modern custom recognizes their right to remain unmolested in their persons, homes, and business as long as they preserve entire neutrality.

Rem. This legal enmity implied between the citizens of hostile States, does not, however, authorize them to *inflict personal injury* upon one another except under the express direction of the State. On the contrary, the citizens of each of the contending States are presumed to be divided into the two classes of combatants and non-combatants. The *combatants* are the military agents of the State who carry on its warlike operations. The *non-combatants* are its peaceful people who continue to attend to their usual avocations, and only indirectly participate in the war. Among the combatants are the regular army and navy; the militia and other organized bodies of armed men who are under the direction of a military chief, and wear an authorized uniform or badge by which they may be known; and others who, being summoned to resist an invasion of the enemy, engage in actual hostilities. *Non-combatants* embrace the remainder of the people except bands of marauders who, without military commissions from the State, perpetrate acts of violence or pillage; and who are regarded as common enemies, having no rights as combatants under the laws of war, and not protected as non-combatants against the vindictive punishment of either hostile State. In combatants alone resides the right to commit acts of hostility against the enemy except in self-defence, and only against combatants are such acts permitted. When engaged in conflict and willing to surrender they also have the *right to quarter;* and if taken prisoners are to be humanely treated, and in due time exchanged or released upon parole. Non-combatants are by law secure from personal interference, though practically liable to suffer in many ways when military operations are conducted in their immediate vicinity.

READ: 1 Bl. Com., pp. 408–421;
1 Kent Com., Lect. iii, pp. 55, 66–69;
Wheaton, Int. Law, §§ 298–336, 356, 357;
Wharton, Int. Law, §§ 336–337 *a*;

Woolsey, Int. Law, §§ 124, 125, 135;
Glenn, Int. Law, §§ 130–133;
Davis, Int. Law, pp. 275, 276, 282–286, 312, 313;
Moore, Int. Law, §§ 1109, 1110, 1135–1142.

§ 447. Of the Effects of War upon the Property Rights of Hostile States and their Citizens.

The laws of war permit the confiscation or destruction, by an invading army, of any *movable property* belonging to the hostile State which is capable of being used in military operations. The *public lands and buildings* of the enemy may also be occupied when necessary or convenient, but not wantonly injured; and property appropriated to charitable or educational enterprises, whether movable or immovable, is generally regarded as exempt from interference. *Immovable private property* is subject to the invader's use, but not to injury or confiscation; while *movable private property*, if on the land, is as a whole inviolate though liable to the levy of contributions in the form of increased taxes, and to requisitions for such specific articles as may be needed by the invader for immediate consumption or temporary enjoyment. The substitution of these strictly regulated burdens, in lieu of the unlimited plunder of ancient times, does not extend to public or private *property at sea*. Such property is not within the enemy's country, nor does its destruction inflict upon its owners other than a pecuniary loss. Hence it is still regarded as *fair spoil of war*, and may in lawful methods be captured and appropriated permanently to the captors' use. The *property of alien enemies*, when situated in the State with which their own State is at war, enjoys the immunity attaching to their persons and their business interests; and until they are notified to remove it, or forfeit its protection by their own misconduct, it is treated as the property of an alien friend.

Rem. *Public debts* due by one of the contending States to the citizens of the other remain always undisturbed as a matter of international policy, since the safety of a State often depends on its ability to borrow money in the markets of the world; and national credit would be worthless were its obligations cancelled by the occurrence of a war between it and the State to which its creditors belong.

READ: 1 Kent Com., Lect. iii, pp. 56–60, 62–66; Lect. iv, pp. 74–79;
Wheaton, Int. Law, §§ 346–356;
Wharton, Int. Law, §§ 14, 338–340;
Woolsey, Int. Law, §§ 126, 136, 137;
Glenn, Int. Law, §§ 146–156;
Davis, Int. Law, pp. 306–311;
Moore, Int. Law, §§ 1183–1194.

§ 448. Of Military Operations.

The modern laws of war demand that *military operations* shall be conducted with the least amount of injury to the hostile State and its citizens, which is consistent with the accomplishment of the object for which the war has been commenced. Hence, in actual warfare, many practices are now forbidden which once were universally accepted as legitimate, such as secret assassination; the use of poisonous or explosive bullets, or other weapons causing inevitable death; the infliction of injuries attended with excessive suffering; and the employment of flags of truce, or hospital flags, or the enemy's uniform, in order to deceive. The bombardment of unfortified towns, or of fortified towns without giving non-combatants a sufficient opportunity to retire to a place of safety; the continuance of slaughter after the enemy has surrendered; and intentional injury to those crippled by wounds, or to hospital corps and tents, — are also prohibited.

Rem. These rules place no restraint upon the adoption of measures which are at once effective and humane, as modern warfare abundantly demonstrates, but tend to develop modes of conflict by which great national issues are speedily decided with a minimum loss of life and of permanent corporal disability.

READ: Wheaton, Int. Law, §§ 342, 343;
Wharton, Int. Law, § 349;
Woolsey, Int. Law, §§ 130–133, 138, 142;
Glenn, Int. Law, §§ 177–181, 183;
Davis, Int. Law, pp. 286–293, 295–305, 322–326;
Moore, Int. Law, §§ 1111–1126.

§ 449. Of Prisoners of War.

Combatants who are captured or surrender thereby become *prisoners of war*, and may be kept in such confinement as is necessary to prevent their escape. They are not subject to punishment unless guilty of actual offences against the laws of war.

It is customary to release officers, and others whose word seems to be reliable, upon their *parole of honor* not to serve again during the war, unless duly ransomed or exchanged. The *exchange* of prisoners between the belligerents, or the payment of a stipulated *ransom*, are other methods of restoring them to freedom. Where a prisoner of war *escapes* and is recaptured no additional penalty can be imposed upon him, but one who violates his parole of honor may be punished with great severity.

Rem. While prisoners of war remain in captivity it is the *duty of the captor* to feed and clothe them comfortably, and in return he may exact from them non-military services suited to their rank. They may be forced to conform to reasonable regulations, and if they rebel or conspire among themselves against their captors, or to effect a violent escape, they may be punished even with death. A *captured spy* wearing the uniform of his own country is a mere prisoner of war, but if taken in disguise within the lines he is liable to execution.

READ: Wheaton, Int. Law, §§ 344, 345;
Wharton, Int. Law, §§ 347, 348;
Woolsey, Int. Law, §§ 134, 141;
Glenn, Int. Law, §§ 137–145, 182;
Davis, Int. Law, pp. 313–321;
Moore, Int. Law, §§ 1127–1134.

§ 450. Of Maritime Warfare.

Maritime warfare is conducted upon the high seas or in the waters of the belligerent States, by their public vessels of war. Until a recent period private vessels were frequently commissioned by the contending States to prey upon the commerce of each other, but modern treaties and the general laws of war now discountenance all forms of *privateering*. In reference to persons the immunities secured to non-combatants and the ameliorations of actual conflict are the same at sea as upon land, but *property at sea* does not enjoy equal protection. As a rule, all vessels sailing under the enemy's flag, or carrying the enemy's license, or engaged in its privileged coasting trade, are regarded as enemy's property and are liable to capture. The same rule applies to the cargoes of such vessels, and to property found in the enemy's ports, unless its neutrality is

shown. From this rule *fishing vessels,* used only in territorial waters, are generally exempt. The flags of neutral States protect their vessels unless they contain articles which are *contraband of war.* Contraband articles include military supplies of any kind which are in transit to the enemy's country, and other chattels destined for the enemy which would be useful in immediate hostilities, though capable of other uses. Such articles are liable to capture at any time after the voyage has begun, and before they reach the port of destination, but the neutral vessel in which they are transported is exempt unless it belongs to the owners of the contraband cargo, or to persons who have knowingly engaged in the contraband trade. When articles of a doubtful character which were produced in the neutral State, and are being forwarded under its flag to the ports of the enemy, are serviceable in the military operations of the captor, they may be retained by him upon payment of their value. The loss by capture cannot be prevented by any secret transfer of the property to neutral owners, either in transit or in port.

Rem. Capture implies an act manifesting an intent to seize the property and hold it as prize of war, and is complete when the persons formerly in possession of the property have surrendered it, and abandoned the effort to recover it. If the captured property is a vessel it is customary to place a prize-master and crew on board, and send it to the nearest port of the captor State, or its ally, for an adjudication upon the lawfulness of the capture and the title of the claimants. In such cases, no injury must be inflicted on the vessel or her cargo, nor any rights exercised over them except to protect them from maritime dangers and recapture. *Captured property* belongs in the first instance to the captor State; but when judicially condemned as prize is usually distributed according to the local law among the combatants by whom it has been taken. The *recapture* of a captured vessel before it reaches the port of the captor State, or of its ally, revests the title in the former owners subject to a claim for salvage on behalf of the recaptors; but its arrival at that port and its condemnation as a prize terminate all previous ownerships, and subsequent captors hold it as their own. The recapture of other chattels has the same effect if made within twenty-four hours after the first capture; beyond that period the rights of the former owner do not survive. The *ransom* of a captured vessel protects it from further molestation from the enemy during the current

voyage, or the time allowed therefor by the terms of the ransom contract.

READ: 1 Kent Com., Lect. iii, p. 61; Lect. iv, pp. 80–86; Lect. v, pp. 89–113; Lect. vii, pp. 135–143;
Wheaton, Int. Law, §§ 358–398, 476, 477, 505–507;
Wharton, Int. Law, §§ 328–330, 345, 346, 368–375, 383–385;
Woolsey, Int. Law, §§ 127–129, 139, 147–152, 193–201;
Glenn, Int. Law, §§ 76, 134–136, 157–167, 241–253, 277;
Davis, Int. Law, pp. 294, 295, 305, 306, 357–375, 439–466;
Moore, Int. Law, §§ 1166–1178, 1204–1265.

§ 451. Of the Military Government of Invaded Territory.

When territory of the enemy has been invaded, and the resistance of the inhabitants has ceased, a *military government* of which the commander of the invading army is the head supersedes the former political authority and continues until the invading army is withdrawn, or the future condition of the territory is determined by treaty or by the establishment of permanent civil institutions. The power of the *military governor* is not limited by any specific rules. He may ordain whatever is necessary for the safety of his army or the success of his immediate enterprise, and may prohibit under the severest penalties any acts which give assistance to the enemy. So far as may be prudent he should maintain existing civil laws, respect the rights of person and property, refrain from needless injury, and make the situation as tolerable as possible for the inhabitants.

Rem. The extent of the *territory under the military government* is measured by the area over which the invading army exercises actual control, though it need not be represented by an armed military force at every place within that territory. During a military occupation both the territory and population are still comprised within the State to which they originally belonged, and on its cessation they resume their former political relations, unless they are annexed by treaty or by conquest to the invading State. In either case the laws enacted and the transactions completed under them during the military government are valid, and cannot be subsequently impeached.

READ: Wharton, Int. Law, §§ 3, 354, 355;
Woolsey, Int. Law, § 153;
Glenn, Int. Law, §§ 168–176, 194;
Davis, Int. Law, pp. 327–336;
Moore, Int. Law, §§ 21, 1143–1156.

§ 452. Of Peaceful Intercourse between Belligerents.

The existence of a war between two hostile States does not imply a personal enmity between their rulers and inhabitants, nor any disregard of those moral obligations which are incumbent alike upon nations and individuals. It is, therefore, to be expected that *peaceful intercourse* should be maintained between them so far as military operations will permit, and this intercourse in fact prevails to a considerable extent. Thus though commerce is legally interrupted by the breaking out of war, yet either belligerent may grant to its own subjects *licenses to trade* with the enemy, and these may take the form of general licenses to all subjects, or of special licenses in favor of a few, or of licenses limiting the traffic to certain vessels, commodities, places, times, or routes. At the inception of a war an agreement, called a *cartel*, is often made between the hostile States containing stipulations as to their intercourse during the coming strife, in reference to the treatment and exchange of prisoners, the care of the wounded, or the interchange of postal facilities; and such agreements may be repeated with modifications as the war progresses. *Passports* may be granted by one State which the other will honor; and *safe-conducts* may be issued by a commander or the State, protecting persons in their journeys through its hostile territory. A *cartel-ship* is a vessel which, by agreement of the contending States, is employed in transporting exchanged prisoners of war. It sails under a safe-conduct from both parties, and both owe it protection from external interference. Such a vessel is not allowed to carry merchandise, nor any armament except the guns needed for signals and salutes.

Rem. Between the armies of the contending nations special negotiations frequently occur, such as a *suspension of hostilities* after a battle for the removal of the wounded and the burial of the dead; or an *armistice or truce*, restoring peace until a certain object is accomplished or a prescribed term has expired. These negotiations may take place between the entire armies or between separate detachments, as circumstances require. The temporary peace begins when the truce is agreed to by the parties. It binds the individual combatants, and other persons, from the date when they receive official notice of the agreement. It ends either at the stipulated time, or after due notification from one party to the

other that hostilities are about to be resumed. During the truce each party must remain *in statu quo*, so far as its immediate military condition is concerned, and neither can do anything to improve its situation which would have been prevented if the tide of war had not been stayed. A *flag of truce*, under the cover of which these negotiations are conducted, is always inviolable; but neither army is obliged to receive the messenger who bears it; nor when he comes during the heat of battle must it cease its fire for fear of injury to him; nor when it receives him is it compelled to admit him within its lines without blindfolding him and taking such other precautions as its own safety requires. The bearer of the flag who employs it as a mask for treachery, or to facilitate his operations as a spy, is liable, if detected, to the penalty of death. A *capitulation* is an agreement between the victor and the vanquished as to the terms of the surrender. Where military conditions alone are involved the capitulation may be made by the commanding officers; where political relations are to be affected the hostile States must sanction the agreement. The terms of the surrender may include any stipulations which are consistent with military honor. A *safeguard* is a protection accorded by a commander to persons or property within the limits of his command, and may consist in a written order of exemption from disturbance delivered to the persons or affixed to the property, or in placing them in charge of a sufficient military force. A *ransom contract* is an agreement to pay a certain sum in consideration for the redelivery of captured persons or property. Its principal uses are for the release of vessels, when too remote at the time of capture to be transmitted to the captor State, or in exchanging prisoners where differences in military rank render an exchange on equal terms impossible. In all these forms of friendly intercourse between belligerents, and in others which from time to time may be adopted, the law of nations demands the same good faith and honest dealing as if the parties were at peace.

READ: 1 Kent Com., Lect. viii, pp. 159–164;
Wheaton, Int. Law, §§ 254, 399–411;
Wharton, Int. Law, §§ 191–195;
Woolsey, Int. Law, §§ 123, 140, 154–157;
Glenn, Int. Law, §§ 195–207;
Davis, Int. Law, pp. 163, 164, 336–339;
Moore, Int. Law, §§ 492–533, 1157–1162, 1179–1182.

§ 453. Of the Restoration of Peace.

The restoration of peace consists in the permanent cessation of war. A *war may end* by the simple abandonment of hostile

operations on both sides, and the gradual resumption of friendly relations between the contending States. The date when a peace becomes established in this manner is always doubtful, and the original cause of the war remains unsettled and liable at any time to be revived. A war may also *end by conquest,* and the extermination of one of the belligerents. In this case, if the subdued belligerent was an independent State, its territory and people pass into the political organization of the victor State, whose sovereignty relates back to the date of occupation, and by whom all the obligations of the conquered State are assumed. If the subdued belligerent was a body of insurgents, a public proclamation by the parent State that the rebellion has been quelled marks the return of peace. Again, a war may end as the result of a treaty of peace. A *treaty of peace,* like other treaties, is usually prepared and signed by representatives of the contending States, and submitted to their respective governments for ratification. Pending these negotiations it is customary to establish a truce, which binds the parties to remain *in statu quo* until the result of the negotiations can be ascertained. If peace is concluded the treaty becomes operative upon the States from the date of signing, and upon individual combatants and citizens from the time when they are notified of its execution. For hostile acts after the signing, and before such notice, the State of the wrongdoer is responsible.

Rem. Peace made by treaty terminates all the controversies out of which the war arose, and implies amnesty for both public and private injuries. If the treaty prescribes nothing to the contrary, each party retains possession of the territory or property it has acquired by arms; as to all other matters rights remain as they existed before the war. When territory is ceded by the treaty it must be delivered to its new sovereign in as good condition as when the treaty was signed.

READ: 1 Kent Com., Lect. viii, pp. 165–177;
Wheaton, Int. Law, §§ 538–551;
Wharton, Int. Law, §§ 356, 357;
Woolsey, Int. Law, §§ 158–162;
Glenn, Int. Law, §§ 208–220;
Davis, Int. Law, pp. 339–345;
Moore, Int. Law, §§ 1163, 1164.

Article II

OF THE RIGHTS AND DUTIES OF NEUTRALS

§ 454. Of Neutral States.

Neutrality may be predicated of States, of persons, of vessels, and of goods or other movable property. A *neutral State* is one which neither participates in the conflict, nor gives aid to either of the belligerents. Neutrality may be perfect or imperfect. A State which adopts a policy of perfect or *strict neutrality* must refrain from any act which assists the belligerents, directly or indirectly, in prosecuting their military operations. It is a *breach* of such neutrality to furnish either of the contending parties with munitions of war; to loan them money or guarantee their credit; to arm or equip for them vessels of war; to permit its own territory to be used for the enlistment of troops for their service, or for the organization or departure of hostile forces against them, or as a base of supplies, or as an habitual place of refuge. But strict neutrality does not forbid the exercise of kindness and humanity toward a belligerent who is in distress; and neutral ports are, therefore, open to belligerent vessels for shelter against perils of the sea, for necessary maritime repairs, and for supplies of a neutral character in quantity sufficient to enable them to reach the ports of their own State. *Land forces* driven within the lines of neutral territory by a victorious army are safe from further pursuit; but as they cannot be allowed to use such territory for military recuperation they must be disarmed by the neutral State and detained until the return of peace, or be released under conditions which debar them from further military service during the war. *Fugitive vessels* entering neutral waters are secure from capture, but cannot make such waters a basis for their naval operations, and may be warned by the neutral State to depart or may be suffered to remain under restrictions which prevent a violation of neutrality. It is the right of neutral States to have their *neutrality respected* by both belligerents; to hold their territory and their waters free from the intercourse of either belligerent for a military purpose; to make and enforce laws protecting their own neutrality; and if their neutral privileges are disregarded, to seek redress by war. During the conflict the commer-

cial intercourse between the neutral and belligerent States, in reference to ordinary commodities, continues as in times of peace subject to the inevitable interruptions caused by a state of war.

Rem. A policy of *imperfect neutrality* allows a State to accord equal military aid to each of the belligerents; and it is optional with every State, in case of war between other States, to determine which policy it will adopt. Imperfect neutrality cannot be subjected to definite rules. Each belligerent must judge for itself whether the neutral State preserves its pretended impartiality, and may on reasonable provocation treat it as an enemy.

READ: 1 Kent Com., Lect. vi, pp. 115–117, 121–124;
Wheaton, Int. Law, §§ 412–428;
Wharton, Int. Law, §§ 12, 40, 388–402;
Woolsey, Int. Law, §§ 163–170, 174–176;
Glenn, Int. Law, §§ 221–226, 228–233, 235–237;
Davis, Int. Law, pp. 376–381, 391–400, 404–437;
Moore, Int. Law, §§ 291–307, 1287–1318.

§ 455. Of Neutral Persons.

A *neutral person* is one whose voluntary domicile is in a neutral State. Since the neutrality of persons depends upon their domicile it is evident that, at the commencement of a war, all persons domiciled in a neutral State are neutrals, and all persons domiciled in a belligerent State are belligerents. A neutral person may *become a belligerent* by removing his domicile into a belligerent State; or by entering its military or naval service; or by sailing as master or seaman in its vessels. While he remains a neutral, unless forbidden by the law of his own neutral State, he may loan money, sell munitions of war, build and arm battleships, and engage in any other traffic with one or both of the belligerents, at the risk of the confiscation of the property should it be captured and found to be contraband of war. Nor will his acts of this character compromise the neutrality of his own State, provided it endeavors in good faith to prevent him from assisting the parties to the conflict. A person domiciled in territory held by organized insurgents is not a neutral, whatever his political sympathies may be, but is legally an enemy of the parent State.

Rem. Domicile, as a test of neutrality, signifies legal domicile, not mere residence in or temporary transit through the neutral

or belligerent State. Legal domicile is the State to which the person is politically related as a citizen, and this is presumed to be the State of his residence until the contrary appears.

READ: 1 Kent Com., Lect. iv. pp. 74–79;
Wharton, Int. Law, §§ 198–200, 352, 353;
Woolsey, Int. Law, §§ 71–74, 172, 173;
Glenn, Int. Law, §§ 184–193, 227, 234;
Davis, Int. Law, pp. 156–163;
Moore, Int. Law, §§ 487, 488.

§ 456. Of Neutral Vessels.

A *neutral vessel* is owned in a neutral port, and sails under a neutral flag. A neutral vessel, complying with the obligations of neutrality, is exempt from interference by either of the belligerents further than is necessary to assure them that those obligations are fulfilled. Of this fact they have a right to satisfy themselves, and for this purpose the war vessels of either belligerent may stop a neutral vessel on the high seas, examine its papers, and if apparently necessary *search* its cargo; detaining it no longer and occasioning it no greater inconvenience than is inevitable. Resistance by the neutral vessel to such an examination, or any falsification of its papers or wilful concealment of unlawful cargo, deprives it of the protection due to neutrals and renders it for the time being a belligerent. A neutral vessel, ignorant of the existence of the war or of the nationality of the interfering vessel, is not bound to submit to search and forfeits no neutral rights by its refusal. A *breach of neutrality* may be committed by a neutral vessel by knowingly conveying troops or official personages or military despatches or supplies for one of the belligerents; or by carrying to it goods that are contraband of war; or by attempting to run a lawful blockade; or by sailing for a belligerent port with the intent, on the part of its owners, to sell the vessel to the belligerent State. But the innocent transportation of a cargo composed in part of contraband articles does not, of itself, compromise the vessel; and where it would have been liable to confiscation, had it been arrested with the contraband on board, that liability ceases when the voyage is completed and it resumes the character of a neutral vessel.

Rem. A neutral vessel loses its neutrality by transfer to a belligerent owner, or by adopting a belligerent flag, or by trading under a belligerent coasting license, and then becomes subject to the usual liabilities of a belligerent. The fraudulent transfer of a belligerent vessel to a neutral owner, in order to prevent its capture, does not change its national character nor endow it with the privileges of a neutral.

READ: 1 Kent Com., Lect. iv, p. 86; Lect. vii, pp. 152–158;
Wheaton, Int. Law, §§ 340, 341, 440, 441, 502–505;
Wharton, Int. Law, §§ 33, 325–327;
Woolsey, Int. Law, §§ 208–221;
Glenn, Int. Law, §§ 268–277;
Davis, Int. Law, pp. 479–496;
Moore, Int. Law, §§ 309, 321–328, 1195–1203.

§ 457. Of Neutral Goods.

Neutral goods are goods belonging to a neutral person, and not contraband of war. Although some doubt remains as to the precise definition of neutral goods yet the later doctrine seems to be that, with the exception of contraband of war, all *goods are neutral* which either belong to neutral owners or are in transit under a neutral flag. According to this doctrine the movable property of a belligerent, while forming part of the cargo of a neutral vessel, and the movable property of a neutral wherever it may be, are to be protected as neutral goods unless their nature and destined use prove them to be contraband of war. This rule does not apply to property owned by a citizen of a neutral State and employed by him in business within the territory of one of the belligerent States, nor to the produce of land owned by a neutral in the belligerent State, since as to his commercial operations and his landed interests in the belligerent State he is regarded, by the law of nations, not as a neutral but as a belligerent. In the application of this rule to neutral vessels, and their cargoes, the ownership of the goods is supposed to follow that of the flag. The cargo of a neutral vessel is presumed to belong to neutral owners; the cargo of a belligerent vessel to belligerents; and this presumption is conclusive as to neutral vessels and their cargoes but may be rebutted by the neutral owners of the cargoes of belligerent vessels.

Rem. Neutral goods share, nevertheless, to a considerable extent in the fortunes of the vessel in which they are contained.

If the vessel is a belligerent the goods are liable to injury in conflict, to capture and adjudication, and to all the delays and expenses incident thereto, although they may finally be regained by their neutral owner. If the vessel is a neutral the goods are subject to search by the belligerents, and if their character, as contraband or not, is doubtful the searching belligerent may pre-empt them for his own use on payment of a reasonable price; while if the vessel violates the obligations of neutrality, and the goods belong to the same owner, they also lose their neutral rights and become spoils of war.

READ: 1 Kent Com., Lect. vi, pp. 124–133;
Wheaton, Int. Law, §§ 442–474, 529;
Wharton, Int. Law, §§ 341–344;
Woolsey, Int. Law, §§ 182–192;
Glenn, Int. Law, §§ 278, 279;
Davis, Int. Law, pp. 382–387;
Moore, Int. Law, § 1336.

§ 458. Of Blockades.

The most serious limitation upon the privileges of neutrals during the time of war is that imposed by a *blockade*. The law of nations recognizes the right of a belligerent State to close the ports of its antagonist against the ingress and egress of all vessels, and thus cut it off from commercial intercourse with the external world; and this right it is the duty of every neutral to respect. But to entitle a blockade to the respect of neutrals it must be an *actual blockade*, maintained by a sufficient naval armament to render probable the capture of any vessel which should undertake to pass its lines. Such a blockade is not confined to the mouths of harbors but may extend indefinitely along the coast, and in front of other waterways as far as it can be made effective. Moreover, it must be substantially *continuous* in point of time, though capable of interruption by stress of weather or the pursuit of some intruding vessel. A neutral vessel endeavoring to enter a blockaded port is not liable to capture unless it has been *notified* of the establishment of the blockade. To secure this notice it is customary for the blockading State to announce beforehand, to all neutral States, its purpose to close the ports in question at a certain date; and, in addition to this warning, for the blockading fleet to inform approaching vessels of the existence and extent of the blockade. Vessels leaving a neutral port after the blockade has

been proclaimed, or lying in the blockaded port when the blockade is commenced, are presumed to have due notice; concerning other neutral vessels it must appear that they had actual knowledge, or they are not bound by the blockade. If neutral vessels are in the port when it is closed they are allowed a certain *period in which to depart,* and if they are afterwards driven in by storm, or by an imperative need for provisions or repairs, or if they are permitted to enter by the blockading fleet, they have a reasonable opportunity to retire. The courtesy of nations also allows free passage to neutral vessels of war. A *violation of a blockade* consists in any attempt to enter or leave a blockaded port except in case of maritime necessity, or in pursuance of a legal right or of a license granted by the blockading State. The attempt begins, according to the English and American interpretation, when the vessel, having then a knowledge of the closing of the port, leaves its home port with the intention of running the blockade. Other nations hold that no fault is committed until the vessel reaches and endeavors to pass through the lines of the blockade. Such attempt renders the vessel *liable to capture* and condemnation, and its cargo also if belonging to the owners of the vessel, or to other persons in conspiracy with them. This liability continues from the date of the attempt during the remainder of the voyage, unless meanwhile the blockade has been abandoned.

Rem. A blockade, once established, is presumed to be in force until formally discontinued, but may be ended by the capture or permanent dispersion of the blockading fleet, or by the conquest or cession of the blockaded territory. Justice to neutral States requires that they should be informed of the determination of the blockading State to withdraw its fleet, as soon as possible after that decision has been reached.

READ: 1 Kent Com., Lect. vii, pp. 143–152;
Wheaton, Int. Law, §§ 509–523;
Wharton, Int. Law, §§ 359–363, 365;
Woolsey, Int. Law, §§ 202–207;
Glenn, Int. Law, §§ 254–267;
Davis, Int. Law, pp. 468–478;
Moore, Int. Law, §§ 1266–1286.

§ 459. Of the Remedies for Violations of Neutrality.

The *violation of neutrality* by a neutral State or by one of the belligerents is, if the aggrieved State sees fit to so regard it, a suf-

ficient cause for war. Less stringent measures are, however, usually employed, since if the injured party can be placed *in statu quo* it is considered that the national honor and security have been preserved. Thus where a vessel of one of the belligerents has been driven by the other into neutral waters, and there captured without resistance, the neutral power may seize it and restore it to its owner; and must do so if possible, or answer to the State of the owner for its failure. Where property of one belligerent is injured by the other upon neutral territory, the neutral must demand and enforce a reasonable reparation. If prisoners of war are brought by a belligerent into a neutral State, the neutral must release them or become liable to their own State for aiding the belligerent in their confinement. Where citizens of the neutral State, while within its jurisdiction, afford military assistance to either of the contending States, the neutral State must interfere and prevent or punish their offences, or it will adopt their acts and subject itself to reprisal or to war.

Rem. The violation of neutrality by persons, vessels, or goods does not involve the State to which they may belong unless the violation occurred within its territory. The treatment of such persons as belligerents, and of such goods and vessels as legitimate spoils of war, affords for these offences an adequate redress.

READ: 1 Kent Com., Lect. vi, pp. 117–121;
Wheaton, Int. Law, §§ 429, 432–435;
Wharton, Int. Law, §§ 18, 19, 21, 223–230;
Glenn, Int. Law, §§ 238–240;
Davis, Int. Law, pp. 350–354, 400–403;
Moore, Int. Law, §§ 1319–1335.

BOOK IV

OF PUBLIC WRONGS AND REMEDIES

§ 460. Of the Nature of Public Wrongs.

Every invasion of a public right is a *public wrong*, whether the right be that of one State against another State, or that of a State against a subject, or that of a subject against a State. Wrongs committed by one State against another are infringements of the rules of international law; are irremediable by legal or judicial processes; and can be redressed only through voluntary concessions between the States, or through some form of retaliation, or through war. Wrongs inflicted by States upon their subjects are violations of constitutional rights for which relief, if not obtainable by suits or prosecutions against the officers of the offending State, must be pursued through political measures, peaceable or forcible as the case requires. Wrongs committed by subjects against the State are of two classes: (1) Those which invade some special right of the State, from whose violation the State itself sustains a direct injury; (2) Those which primarily infringe some private right which the State has undertaken to protect, and at the same time indirectly prejudice the welfare of the State. The first of these two classes is a purely public wrong; the second has a double aspect, — as a private wrong demanding a private remedy in a civil action, and as a public wrong invoking the interference of the State for its public prosecution and punishment. To wrongs committed by subjects against the State, of either of these classes, is given the name of "*Crimes.*" Various definitions of the word "*crime*" may be found in the reports and treatises; some declaring its distinctive attribute to be its prohibition by the State; others, its injurious effect upon the public; and others, its prosecution and punishment by the State in its own name. Considered in its *intrinsic*

nature, as well as in the attitude assumed toward it by the State, it may be defined as "a wrong directly or indirectly affecting the welfare of the State, to the commission of which the State has annexed certain pains and penalties, and which the State prosecutes and punishes in its own name." This definition at once characterizes the wrong and indicates the mode of its redress, and thus suggests the natural division of the law governing the whole subject into (1) The Law of Crimes; and (2) The Law of Criminal Procedure.

Rem. The reasons which determine the State to treat as public wrongs such injuries as primarily invade mere private rights vary with the country and the age. If under existing social conditions, and according to current moral standards, the wrong is of great enormity, or of evil example, or of dangerous tendencies, or of far-reaching consequences, it is the wise policy of the State to endeavor to prevent it by visiting it with a penalty. When private wrongs once public lose their prejudicial influence, through changes in the social fabric, the laws forbidding them are properly repealed or become obsolete, and they lapse back into the class of purely private wrongs. Whether the elevation of a private into a public wrong *destroys or suspends* its private character is also a question which the State decides according to its view of the public interest. In certain grave cases, like homicide, it has for many centuries been held that the private wrong was submerged in the public offence, and even now it is only in special circumstances and by virtue of particular statutes that a private remedy for this wrong can be obtained. In other cases the private wrong, though not extinguished, was suspended and compelled to wait for its redress until the public wrong had been punished or condoned. In still less flagrant cases concurrent remedies were available for both the party injured and the State. In this country, at present, the prevailing rule recognizes the private as well as the public character of all these public wrongs excepting homicide, and permits the wrongdoer to be sued and prosecuted at the same time for his offence.

READ: 4 Bl. Com., pp. 1–7;
Desty, Criminal Law, § 1;
May, Law of Crimes, § 1;
1 Bishop, Criminal Law, §§ 30–42, 229–254;
Wharton, Criminal Law, §§ 14, 15;
McClain, Criminal Law, §§ 1–4.

PART I — OF THE LAW OF CRIMES

§ 461. Of the Intrinsic Nature of Crime.

A crime being an action or omission which the State regards as prejudicial to its welfare, and therefore prohibits under pain of punishment, the *State alone is the judge* whether it should be forbidden and what should be its penalty; and on these points the action of the State, if within its constitutional powers, is final and binding alike upon its courts and citizens. This decision of the State may be announced in a single statute defining the offence and prescribing the penalty, or it may be embodied in various statutes and doctrines of the unwritten law which, taken together, describe and prohibit the crime. But until the State in some form promulgates this decision the wrongful action or default does not become a crime, nor is its perpetrator liable to punishment; and when the State repeals the law, in which this decision was expressed, the action or default at once ceases to be a crime, and all liabilities under the law, as formerly existing, are immediately discharged. The intrinsic nature of a crime is not, therefore, a question of fact to be solved by an analysis of actions and omissions, but a *question of law* to be settled by reference to legal definitions and distinctions. These legal definitions and distinctions relate (1) To the Ingredients, Degrees, and Perpetrators of Crimes in general; and (2) To the Classes and Species of Criminal Actions and Omissions.

Rem. In statutory definitions of crime, as in all other statutes, the State constantly builds on the foundations of the common or unwritten law, and thereby makes the unwritten law an essential ingredient of the definition. Thus where a statute declares an act to be a public wrong, but makes no mention of the punishment, the unwritten law supplies the omission according to the class to which such crimes belong. So also where the statute affixes a penalty to a specific act without otherwise forbidding it, the general principles of law give to the statute a prohibitive interpretation, and regard it as affirming that the action is a crime. As a matter of legal history this creation of crimes by

the statutory development of the unwritten law, as well as by the judicial extension of ancient offences to embrace new forms of injury, is continually occurring in the effort of the State to keep pace with the ingenuity of criminals, and the increasing facilities and opportunities for crime.

READ: 1 Bl. Com., pp. 53–58;
Walker, American Law, § 253;
Clark, Elementary Law, §§ 85, 86;
Hawley, Criminal Law, pp. 3–7;
Clark and Marshall, Criminal Law, §§ 1, 2, 4, 5, 7–18;
Clark, Criminal Law (Tiffany Ed.), §§ 1, 2, 3;
Kenney, Criminal Law, pp. 1–23;
Wharton, Criminal Law, §§ 15 *a*–20, 28–31 *b*;
McClain, Criminal Law, §§ 5–8, 81–110.

CHAPTER I

OF THE INGREDIENTS, DEGREES, AND PERPETRATORS OF CRIMES IN GENERAL

§ 462. Of the Characteristics of Crimes in General.

Crimes, as such, have certain general characteristics, common to all crimes, concerning which the law prescribes definite and imperative rules. Every particular crime has also, in addition to these general characteristics, certain special characteristics, equally definite and imperative, in the absence of any of which the law will not recognize the alleged action or omission as that particular crime. These general characteristics relate either to the ingredients of which the action or omission must consist; or to the degrees of criminality attached by the law to individual actions or omissions on account of their relation to each other or to the circumstances under which they are committed; or to the persons by whom the actions or omissions are perpetrated.

Rem. The rules defining and prescribing these general characteristics of crime are, to a great extent, permanent in the law. This is especially true of those relating to the ingredients of crime which, being founded in the nature of things, are not varied by changes in human opinion or in social conditions. Decided cases in reference to these are, therefore, usually of universal authority and rarely qualified by statute, while other rules are more or less subject to variation by local laws.

READ: May, Law of Crimes, § 12;
1 Bishop, Criminal Law, §§ 773–785 *a*;
McClain, Criminal Law, § 16.

SECTION I

OF THE INGREDIENTS OF CRIME

§ 463. Of the Criminal Act.

Every crime is composed of two ingredients: (1) The Criminal Act; and (2) The Criminal Intent. The *criminal act* is that

action or omission which the law forbids. The *criminal intent* is that condition of the actor's mind in consequence of which the criminal act has been performed. The criminal act in any given crime is defined by the rule of law which forbids its perpetration; and this rule, like all other penal laws, is *strictly interpreted* in favor of the person charged with crime, so that no matter how similar his conduct may have been to that forbidden by the law it is not that crime unless it corresponds precisely with the definition which the law contains. The criminal act is always *physical*, and may be *both* physical and mental. When it is wholly physical it may consist in words, or actions, or in omissions to act when action is legally required; and the specific mental purpose with which it is performed is immaterial, and neither adds to nor extenuates its guilt. Where the act derives its criminal characteristic from the purpose which inspires its perpetrator, and the object whose accomplishment he has in view in its commission, the criminal act is partly physical and partly mental; and the physical act without the mental purpose is not the criminal act and, therefore, is not the crime.

Rem. Both a criminal act and a criminal intent are necessary to constitute a crime, for the law does not assume to punish thoughts unless externally expressed, nor to hold persons responsible for actions unless they were both conscious and voluntary. "*Actus non facit reum nisi mens sit rea.*" Moreover, these two ingredients must *concur in point of time;* otherwise the act is not the offspring of the intent, nor could the moral guilt, without which crime is impossible, be imputed to the act if the act were not performed at the moment when the guilty knowledge and intent were present in the mind. The criminal intent, thus described as one of the necessary ingredients of every crime, must not be confounded with that *mental part* of the criminal *act* which pertains to certain crimes only but from which it is totally different both in fact and in law, as will hereafter appear.

READ: 4 Bl. Com., pp. 20, 21;
Hawley, Criminal Law, pp. 23–25;
Desty, Criminal Law, §§ 5, 13–20 *a*;
May, Law of Crimes, §§ 5–8, 38;
Clark and Marshall, Criminal Law, §§ 109–118;
Clark, Criminal Law (Tiffany Ed.), §§ 20, 30–32, 54;
Archbold, Criminal Procedure, pp. 44–48;
1 Bishop, Criminal Law, §§ 204–208 *a*, 223–228, 417–424, 430–441;
Wharton, Criminal Law, §§ 91–93, 125–135, 246–248;
McClain, Criminal Law, §§ 180–198.

§ 464. Of the Criminal Intent.

The *criminal intent* is that condition of the actor's mind in which his intellect discerns the nature of the criminal act and its unlawfulness, and his will determines that the act shall be performed. The existence of this criminal intent is *presumed by law* from the commission of the act. Hence the State in prosecuting criminals has no occasion to offer evidence to prove the existence of the criminal intent, unless the accused alleges and attempts to show that at the time of the commission of the criminal act his intellect was incapable of discerning the nature and unlawfulness of the act, or his will was under such restraint that the act was involuntary. The law recognizes such incapacity or restraint in the six following conditions: (1) Infancy; (2) Insanity; (3) Mistake of fact; (4) Accident; (5) Necessity; (6) Compulsion. The proof of any one of these successfully rebuts the ordinary presumption of criminal intent, and shows that though the criminal act has been committed the actor, in committing it, did not perpetrate a crime.

Rem. The presumption of the criminal intent from the commission of the criminal act is justified partly by experience and partly by the dictates of public policy. Experience teaches that the performance of any act, not automatic in its character, by a being endowed with intellect and will is in most cases coupled with a knowledge of the nature of the act and a determination to commit it, and the presumption thence arising that all acts have the same origin and entail the same responsibility, though not irrebuttable, is yet so strong that the State may justly throw upon the perpetrator of a criminal act the burden of its refutation. That the perpetrator of a voluntary criminal act *knew* the act to be unlawful is a presumption which public policy does not permit to be rebutted. "*Ignorantia legis non excusat.*"

READ: Walker, American Law, §§ 254, 256;
Clark, Elementary Law, §§ 89, 90;
Hawley, Criminal Law, pp. 1–3, 25–29, 37–40;
Desty, Criminal Law, §§ 6–8 *b*, 34–35 *b*;
May, Law of Crimes, §§ 26–31, 51–57;
Clark and Marshall, Criminal Law, §§ 54–62, 73–75;
Clark, Criminal Law (Tiffany Ed.), §§ 13–15, 19, 33, 34, 36;
Kenney, Criminal Law, pp. 33–44, 57–59, 62–64;
1 Russell on Crimes, p. 160;
Archbold, Criminal Procedure, p. 51;
1 Bishop, Criminal Law, §§ 216–222, 285–300, 313–321, 425–429;
Wharton, Criminal Law, §§ 84–86, 106–124;
McClain, Criminal Law, §§ 111–121, 123, 124, 127–130, 132.

§ 465. Of the Criminal Intent: Infancy.

An *infant under seven* is conclusively presumed by law to be without sufficient mind and will to form a criminal intent. Above the age of fourteen he is presumed, but not conclusively, to be of normal capacity, and hence responsible for all his acts. Between the ages of seven and fourteen the law makes no specific presumption, but leaves the question open as a question of fact to be decided by the jury, upon evidence concerning his actual mental condition, with the proviso that if they are in doubt as to his capacity he must be acquitted.

Rem. The presumption that an infant under seven is incapable of crime is an arbitrary rule of law, adopted to avoid the necessity, in every individual case, of proving the actual mental condition of the accused child. It is justified by the common opinion of mankind which fixes the "*age of reason,*" or the period when moral responsibility begins, at the age of seven years. The presumption that an infant over fourteen is able to judge of and direct his actions corresponds with the ordinary social and legal rules which allow infants of that age to marry and become heads of families, to establish themselves in business, and to assume general control over their conduct.

READ: 4 Bl. Com., pp. 21–24;
Rob. Am. Jur., § 30;
Clark, Elementary Law, § 90;
Hawley, Criminal Law, pp. 7, 8;
Desty, Criminal Law, §§ 21–22 *d*;
May, Law of Crimes, §§ 35, 36;
Clark and Marshall, Criminal Law, §§ 88–92;
Clark, Criminal Law, (Tiffany Ed.) §§ 21, 22;
Kenney, Criminal Law, pp. 45, 47;
1 Russell on Crimes, pp. 113–118;
Archbold, Criminal Procedure, pp. 9–16;
1 Bishop, Criminal Law, §§ 367–373;
Wharton, Criminal Law, §§ 67–74;
McClain, Criminal Law, §§ 149–153.

§ 466. Of the Criminal Intent: Insanity.

The doctrine that an *insane person* cannot commit a crime is true only when his insanity is of such a character and extent that, like the irresponsible infant, he lacks the mental capacity to understand the nature, consequences or guilt of the alleged criminal act, or has no such control over his conduct that he could restrain himself from its commission. The *forms of insanity*

are multitudinous, — general, special; permanent, transient; slight, severe; and every instance must be judged by itself, by comparing the content and consequences of the criminal act with the then existing mind and will of the accused. Thus a person whose intellectual and volitional faculties were permanently and seriously impaired could not be held responsible for any criminal act whatever, while a person partially deranged, like a kleptomaniac, might be entirely sane in every other particular, and therefore guilty of any crime save that of theft.

Rem. Upon whom rests the *burden of proof*, when insanity is urged as a defence, has sometimes been disputed. Certain decisions hold that, as every person is presumed to be innocent until he is proved guilty, the State must allege and show beyond a reasonable doubt that the accused was sane at the time the act was committed. Others maintain that, as every person is presumed to be of normal capacity until his abnormality is evident, it is the duty of the accused to aver and prove his insanity beyond reasonable doubt. The better opinion seems to be that as insanity is a matter of defence the accused must raise the question, and support his claim by sufficient evidence to create in the minds of the jury a reasonable doubt as to his mental capacity. This opinion secures to the accused the benefit of the general presumption of innocence, and the opportunity to rebut, if he can, the general presumption of sanity.

READ: 4 Bl. Com., pp. 24–26;
Rob. Am. Jur., §§ 32–34, 38;
Clark, Elementary Law, § 90;
Hawley, Criminal Law, pp. 8–16;
Desty, Criminal Law, §§ 23–29 *c*;
May, Law of Crimes, §§ 39–49;
Clark and Marshall, Criminal Law, §§ 93–106;
Clark, Criminal Law (Tiffany Ed.), §§ 23–29;
Kenney, Criminal Law, pp. 47–54;
1 Russell on Crimes, pp. 118–145;
Archbold, Criminal Procedure, pp. 16–39;
1 Bishop, Criminal Law, §§ 374–407;
Wharton, Criminal Law, §§ 32–66;
Underhill, Criminal Evidence, §§ 154–168;
McClain, Criminal Law, §§ 154–179;
Rice, Criminal Evidence, §§ 396–416.

§ 467. Of the Criminal Intent: Mistake of Fact.

A person of normal mind and will, and therefore capable of understanding the nature and consequences of the criminal act,

may nevertheless fail to understand them for want of sufficient knowledge. Where his *ignorance* is not due to his own carelessness or indifference, his want of knowledge is not his own fault; and if he acts prudently, upon such knowledge as he has, he is neither morally nor criminally responsible. Thus a careful nurse, administering the wrong medicine by mistake, may innocently kill her patient; or one man, justly believing from appearances that another is about to make a dangerous attack upon his life, may lawfully anticipate the danger by slaying his apparent adversary. Mistakes of this kind, due to inevitable human infirmities and limitations, frequently occur. The law, while not relieving the mistaken actor from liability to the injured party in a civil suit, applies to him the rule that if in good faith, and upon a reasonable belief that certain things are true, he does an act which if those things were true would not be a crime, the fact that those things were not true cannot change the character of his mental operations, nor justify the imputation to him of a criminal intent.

Rem. In the application of this rule by the courts great confusion and misunderstanding may easily arise. The rule has *no relation* to cases where the accused raises the issue of *self-defence;* for there the accused justifies his conduct on the ground that there was no mistake of fact because the apparent attack which he resisted was actually made. Nor does the rule protect a person who *intending one crime* by mistake *commits another,* for there the criminal intent presumed by law is present though directed to a different criminal act. Nor can one avail himself of this defence who acts in ignorance when the law *forbids him to act at all* until he has acquired proper knowledge, — as in some cases where the accused is charged with selling adulterated provisions.

READ: 4 Bl. Com., p. 27;
Clark, Elementary Law, § 89;
Hawley, Criminal Law, pp. 29–36;
May, Law of Crimes, § 50;
Clark and Marshall, Criminal Law, §§ 68–72;
Clark, Criminal Law (Tiffany Ed.), § 35;
Kenney, Criminal Law, pp. 60–62;
1 Bishop, Criminal Law, §§ 301–312;
Wharton, Criminal Law, §§ 87–90;
McClain, Criminal Law, §§ 131–135.

§ 468. Of the Criminal Intent: Accident.

An accidental criminal act raises no presumption of a criminal intent. *Accident* may be predicable either of an act or of its consequences. An *act itself* may be accidental in two ways: (1) Where the actor did not intend to perform any act at all; (2) Where he intended one act but performed another. To slip and fall against another person, and thereby injure him, would be an instance of the former; to discharge a pistol in the endeavor to extract the cartridge would be an example of the latter. In the first case, if the actor were free from negligence, no fault whatever could be imputed to him. In the second, if the act which he intended to perform were lawful, and he exercised due diligence to confine his act within the limits of his intention, the unintentional excess which caused the explosion would entail no criminal liability upon him. The *consequences of an act* are accidental when, though the actor fully understood the nature of his act and intended to perform it as he has performed it, yet the results which followed from it were of such a strange and unusual character that he could not have been expected to foresee them. In this case, if his act were lawful and performed with proper care, no guilt attaches to him. But if his act were unlawful, or negligent, a further distinction must be made between those unexpected consequences which grow out of the known or knowable nature of the act, and those which are produced by certain of its attributes which have hitherto been beyond the reach of human knowledge, or by the concurrent operation with it of extraneous causes whose presence could not have been anticipated. Of all the consequences which follow from the known or knowable nature of a negligent or unlawful act the actor takes the risk, and they measure his responsibility whether his personal knowledge extends to them or not, Thus the perpetrator of a simple assault is held guilty of a homicide when from a possible but unexpected disease engendered by the injury, or from its customary surgical treatment, the victim dies, although the blow was given with no intent to kill. But when the consequences were occasioned by the then undiscoverable though since discovered attributes of the act, or by the co-operation with it of unanticipated causes, they lie, neither in fact nor by any fair presumption, within the range of the intentior

of the actor, nor can he be justly chargeable with them as constituent elements of his criminal act. Thus the vendor of adulterated food is guilty of an unlawful act, and is responsible for the harm sustained by the consumer from its known or knowable injurious effects. But should the food contain some poisonous substance whose presence in such food was never hitherto detected, or should its union in the stomach of the consumer with extraneous substances produce deleterious combinations which destroy his life, no reasonable person would impute his death either to the intent or to the acts of the vendor.

Rem. The distinctions between an act and its consequences, and between the different relations of consequences to acts, often become of primary importance in criminal prosecutions, and to disregard them might easily and unjustly aggravate a mild offence into a heinous crime. Many cases of homicide present these questions, which from the ignorance or carelessness of counsel are liable to pass unnoticed. The legal acumen of the great criminal lawyer is no less manifest in the discovery and presentation of such distinctions to the court than are his resources as an advocate in his skill in handling evidence and his appeals to the jury.

READ: 4 Bl. Com., pp. 26, 27;
Clark, Elementary Law, § 89;
Desty, Criminal Law, §§ 30–30 *b*;
Archbold, Criminal Procedure, pp. 49–51;
1 Bishop, Criminal Law, §§ 323–345;
Clark, Criminal Law (Tiffany Ed.), §§ 37, 67.

§ 469. Of the Criminal Intent: Necessity.

A criminal act raises no presumption of a criminal intent when committed under the pressure of inexorable necessity. The *necessity* here contemplated resides not in the act itself, for then the act would not be voluntary, nor in the mind of the actor because it is assumed that there was no mistake of fact, but in the external conditions which surrounded the actor when the act was performed. Such necessity is of two kinds: Actual and Legal. *Legal necessity* grows out of the obligation to discharge some legal duty, like that of a sheriff to execute a death-warrant, or of an officer to capture even if he thereby kills an escaping felon. *Actual necessity* arises from some emergency in which the actor, without his own fault, has been placed by the party

against whose person or property the criminal act has been committed. One who takes the life of an assailant in true self-defence, or who destroys a nuisance against his health when it cannot be otherwise abated, acts through such necessity. When this defence is urged it is admitted that the criminal act has been completely performed, and that the accused possessed the mental and moral capacity to render him responsible for its commission, and throws upon him the burden of proving that, either in the discharge of his legal duty, or in the proper protection of his legal rights, its perpetration was inevitable.

Rem. This doctrine of necessity does not extend so far as to permit one innocent person to shift his burdens upon the shoulders of another who is equally innocent. Two shipwrecked sailors, clinging to a plank of insufficient buoyancy to sustain them both at once, have equal rights, and neither can push off the other to be drowned without incurring the guilt of murder. Nor can a man assaulted with a deadly weapon use a third person as a shield, and compel him to receive the intended wound, without himself becoming a participator in the homicide. Such is the doctrine of the Common Law. A contrary rule prevails in certain other systems which recognize the right of one innocent person to protect himself, in extreme emergencies, even at the sacrifice of others who are also innocent.

READ: 4 Bl. Com., pp. 27, 28, 30–32, 183–188;
Rob. Am. Jur., §§ 44, 45;
Clark, Elementary Law, § 89;
Desty, Criminal Law, §§ 31–31 *f*;
May, Law of Crimes, §§ 58–68;
Clark and Marshall, Criminal Law, §§ 76, 77, 80–82, 84;
Clark, Criminal Law (Tiffany Ed.), §§ 38, 41;
Kenney, Criminal Law, pp. 68–71;
1 Russell on Crimes, pp. 145–160;
1 Bishop, Criminal Law, §§ 346–355, 836–877;
Wharton, Criminal Law, §§ 95–103, 484–547;
McClain, Criminal Law, §§ 136–144, 301–316.

§ 470. Of the Criminal Intent: Compulsion.

Compulsion is that condition of the actor at the time of the act in which, although his action is intelligent and may be deliberate, his will is in subjection to some external will and, therefore, does not freely concur in its performance. Compulsion may be either Actual or Presumed. *Actual compulsion*

is the illegal exercise of force, threats, privation, imprisonment, or other ill treatment by some third party, for the purpose of compelling the commission of the act. *Presumed compulsion* is that which the law implies from the relation of the parties, — as where a wife, by the command and in the presence of her husband, commits a criminal act of lower grade than treason, robbery, or murder.

Rem. Compulsion may be of *different degrees*, — from that wherein the actor becomes the mere passive tool of another dominating personality, to that which just so far influences his conduct as to prevent him from the exercise of complete self-control. Not every degree of compulsion is sufficient to rebut the legal presumption of the criminal intent. The character and consequences of the criminal act, the natural fortitude of the actor, and the forces brought to bear upon him to compel him to commit the act are all to be considered; and in the light of these three factors it must be determined whether, in reason and justice, he could have been expected to resist the compulsion and refrain from the performance of the act. The more enormous the crime the higher is the demand which the law makes on the self-restraint of the actor. Thus, to excuse an act of treason nothing but the well-grounded fear of immediate death suffices: to palliate a theft the dread of bodily harm may be accepted. This defence has no relation to that of necessity, but is in many cases closely allied to those of insanity and mistake of fact.

READ: 4 Bl. Com., pp. 28–30;
Clark, Elementary Law, § 89;
Hawley, Criminal Law, pp. 16–20;
Desty, Criminal Law, §§ 16–17 *b*, 32–32 *b*;
May, Law of Crimes, § 37;
Clark and Marshall, Criminal Law, §§ 78, 83, 85–87;
Clark, Criminal Law (Tiffany Ed.), §§ 39, 40;
Kenney, Criminal Law, pp. 64–68;
Archbold, Criminal Procedure, pp. 39–44, 52–54;
1 Bishop, Criminal Law, §§ 356–366;
Wharton, Criminal Law, §§ 75–83, 94, 94 *a*;
McClain, Criminal Law, §§ 145–148.

§ 471. Of the Specific Intent.

When the criminal *act*, as defined by law, is partly physical and partly mental, the mental part of the act is technically known as the "*specific intent.*" The specific intent has no resemblance to the criminal intent, except that both are mental conditions

The criminal intent is not an actual but a *presumed* intent, *concurrent with* but not *contained within* the criminal act. The specific intent is an *actual* purpose or design existing in the mind of the actor, and is an essential *element* of the criminal *act*, which is never presumed as matter of law, but must be proved as matter of fact equally with the physical portion of the criminal act. Examples of crimes involving a specific intent are numerous. Such are forgery, whose criminality depends on the intent to defraud with which the fictitious document was made; burglary, which differs from a simple trespass in the felonious intent with which the breaking and entering are performed; assaults with intent to kill or rob or ravish, and many others. In proving this intent two facts must be established: (1) The mental capacity of the accused to form that particular intent; (2) Its actual formation, and concurrence with the physical portion of the act. The capacity of the accused to form the intent is presumed until the contrary appears; but may be disproved by any evidence which indicates that at the time of the commission of the physical act his mind, from any cause whatever, was in such a condition that he could not have voluntarily conducted those intellectual operations which enter into the formation of that particular specific intent. This is by no means the same question as that of sanity, and responsibility for criminal acts. A person may be old enough and sane enough to be accountable for his external conduct, and yet incapable of so estimating ends, and selecting means for their accomplishment, as to form a specific design to defraud or to commit a particular felony. In reference to proof of the formation of the specific intent, in cases where capacity to form it is not denied or successfully disputed, the ordinary rules of evidence prevail; and the existence or non-existence of the intent must be inferred from circumstances, such as the results accomplished by the act, the instruments employed and preparations made, the declarations of the accused concerning his act, and his use on other occasions of the same means for the attainment of a similar end. A specific intent to achieve a premeditated result by a particular act may exist in the mind of the accused, though, for reasons not disclosed to him, it may be certain that the result can never follow from the act; and thus a person may commit an assault

with intent to rob, although the victim may not have in his possession any property which is subject to theft. But no sane person can intend a consequence which is in itself and is known by him to be inherently impossible.

Rem. Upon the doctrine of specific intent the attitude of the law toward *drunkenness*, as an excuse for crime, is especially important. Public policy forbids that drunkards, unless permanently insane, should escape from liability for their criminal acts on account of their voluntary intoxication; and when their criminal acts are proven their criminal intent is presumed, and they are punished as if their acts were voluntary and intelligent. But when the question of specific intent arises the actual condition of the accused is open to investigation, and if he were too drunk, at the time he committed the physical action, to put together the factors of the intellectual problem and correlate them in a definite design and purpose, the mental portion of the criminal act is wanting, and of that particular crime at least he is not guilty. Thus drunkenness may sometimes be urged successfully in cases of theft on the ground that the accused could not have formed the necessary intent to steal; or in cases of alleged killing with malice aforethought where the evidence shows that the homicidal act was committed when the assailant was too drunk to entertain a deliberate and premeditated purpose to destroy the victim's life.

READ: Clark, Elementary Law, § 89;
Hawley, Criminal Law, pp. 20–23, 36, 37;
Desty, Criminal Law, §§ 27–27 *c*;
May, Law of Crimes, §§ 32–34, 47–47 *b*;
Clark and Marshall, Criminal Law, §§ 63–67, 107, 108;
Clark, Criminal Law (Tiffany Ed.), §§ 16–18;
Kenney, Criminal Law, pp. 54–57;
Archbold, Criminal Procedure, p. 30;
1 Bishop, Criminal Law, §§ 408–416;
McClain, Criminal Law, §§ 122, 125, 126, 161, 162.

SECTION II

OF THE DEGREES, RELATIONS, AND PUNISHMENT OF CRIMES

§ 472. Of the Degrees of Crime.

The same physical action may be an *ingredient of several different crimes* according to the consequences it produces, or the intent with which it is committed, or the circumstances which surround it, or the various systems of law by which it

may have been prohibited. Thus an unlawful blow struck at another may fail to reach him, and be a mere assault; or it may reach him and cause him a slight injury, and therefore be a battery; or it may produce a serious lesion and amount to wounding; or it may destroy a limb, and be a mayhem; or it may take his life and be a homicide; in each of which cases the act of the assailant is the same but is differentiated as to its degree of criminality by the comparative importance of its consequences. Again, an assault with intent to beat is one crime; with intent to maim, another crime; with intent to kill, another crime; and with intent to murder, still another crime. Again, an assault upon a person in a private room, or in a place remote from public view, is simply an assault; if in a public place, it is a breach of the peace; if in the presence of a court, or legislative body while in session, it is a contempt. Again, to mail an obscene libel to another is a criminal nuisance because of its obscenity; it is also a disturbance of the peace because it is a libel; it is also a breach of the postal regulations of the United States; the first two offences being crimes under the common law or statutes of the individual State, the last a crime under the Acts of Congress.

Rem. Besides this differentiation of degrees of crime based on their nature, circumstances, and results, further degrees are sometimes established by local statutes; in order to affix more definitely and justly their distinctive penalties. Thus murder is frequently divided into two degrees, — one characterized by premeditation and punished with death; the other a true murder, intentional and malicious but without premeditation, and punishable by imprisonment. These distinctions are in some statutes carried to a great minuteness, in striking contrast to the general definitions of the common law.

READ: Hawley, Criminal Law, pp. 141, 142.

§ 473. Of the Merger of Crimes.

In cases where the degree of the criminal act is measured by its consequences all lesser degrees *merge* in the greater. Thus a blow causing death is a homicide only, and is no longer regarded by the law as an assault, a battery, a wounding, or a mayhem, all of which in its true character it might also be. In

like manner an attempt merges in the completed crime, and a conspiracy in the overt act of the conspirators. In cases where the degree depends on the specific intent, if the different intents prompting the action were so related to each other that the more malignant included the less, as in the intents to beat, maim, kill, and murder, the worst intent expressed by the act absorbs the others, and the act is a crime characterized by that intent alone. If, however, the specific intents were in their nature independent of one another, as where an assault is made both with intent to rob and an intent to ravish, no such merger takes place, each being in the law an attempt to commit an entirely different crime. In cases where the degree of crime depends upon the circumstances which surround it, whether the lower degree merges in the higher is determined by the same test as in the foregoing cases. Thus if the higher and the lower crimes are of the same legal character, and violate the same private and public rights, the less will be lost in the greater as a common assault is merged in an aggravated assault or in a breach of the public peace. But if the crimes differ in their legal character or in the right which they invade, as a contempt of court differs from an attack upon the person, there is no merger and the offences are separately punishable. In cases where the same criminal act transgresses two or more distinct rules of law relating to independent subjects, or is forbidden by two different sovereignties, there is no merger, however similar in consequences, circumstances, or intent the crimes may be.

Rem. This doctrine of merger controls both prosecutions and defences. Where the same criminal act constitutes several different degrees of crime, the lesser of which under the foregoing rules would merge in the greater, the State in prosecuting may elect the degree on which it will base its prosecution, in view of the nature and availability of the evidence, the general justice of the case, or any other matter of public policy; or it may prosecute for all degrees at once, leaving it for the court and jury to determine which charge the law and evidence sustain. As a general rule a prosecution for a greater degree alone waives the right to subsequently commence proceedings for a lower, whether on the former prosecution the accused has been convicted or acquitted; but a contrary rule has sometimes been asserted. Where such a waiver is recognized by local law, merger would be a good defence on any second prosecution for the crime, whatever might

have been the degree on which the former proceedings were based. As modern decisions permit a jury, on prosecutions for a higher degree of crime, to find the accused guilty of any lesser degree, it has become the custom to charge him with the highest degree alone and accept the verdict of the jury as a final decision of the case, since a verdict of guilty of any one degree operates as an acquittal of all the rest. Under this custom questions of merger less frequently arise.

READ: Hawley, Criminal Law, p. 115;
Clark and Marshall, Criminal Law, § 6;
Clark, Criminal Law (Tiffany Ed.), §§ 11, 12;
1 Bishop, Criminal Law, §§ 263 *a*–278, 786–815 *a*;
Wharton, Criminal Law, §§ 27, 27 *a*;
McClain, Criminal Law, §§ 10, 11, 22.

§ 474. Of the Victims of Crime.

The criminal act may be *directed against* the State or its property, or against the persons or the property of individuals. The legal relations between these victims of the criminal act and the act itself are fixed by law, and cannot be varied by any conduct or agreement of the parties. Where the State is the injured party no *laches* or neglect of its officers, in enforcing the laws, can justify or excuse the act by which they have been violated. When the object of the act is property, either public or private, its character, quantity, and value do not diminish or increase the guilt of one who steals or injures or destroys it, unless the law has thus discriminated for it or against it. The *consent* of the person against whom the criminal act has been committed, or the *enticement* of a decoy, does not relieve the offender from responsibility; nor does the guilt or *negligence* of the victim excuse the actor unless they led him into a mistake of fact, or created a necessity sufficient to rebut the presumption of criminal intent. After a crime has been committed it cannot be *condoned* by any private authority; but remains against the perpetrator until he is judicially acquitted, or is convicted and punished, or is pardoned by the State, or the right of the State to prosecute him for the offence has been formally waived, or has been barred by the Statute of Limitations.

Rem. Although no power resides in any person to consent to or condone public offences, except the legally appointed pardon-

ing authorities, yet prosecuting officers and judges necessarily exercise a wide discretion in the administration of criminal law. The State, according to its nature, is controlled not by notions of abstract right and justice but by the immediate practical interest of the public; and as it makes and abrogates laws in view of the current public good, so it enforces or ignores them as the public good requires. A *prosecuting officer* may thus refrain from pursuing a well-known criminal for an indisputable offence, if under all the circumstances it may seem unwise to prosecute the crime. In minor cases this is often done at the request of the injured party, or when he manifests so little interest in the case as to fail to pursue the offender. Judges, after the accused has been convicted, sometimes decline to pass a sentence, and release the prisoner on his own recognizance, for similar reasons. The fact that this discretion may occasionally be abused is no ground for withholding it; since the public welfare demands that it exist somewhere and no better lodgment for it than the present one can be devised.

READ: Clark, Elementary Law, § 104;
Hawley, Criminal Law, pp. 40–43;
Desty, Criminal Law, §§ 33–33 *b*;
May, Law of Crimes, §§ 21–25;
Clark and Marshall, Criminal Law, §§ 150–162;
Clark, Criminal Law (Tiffany Ed.), § 2;
1 Bishop, Criminal Law, §§ 255–263;
Wharton, Criminal Law, §§ 136–150.

§ 475. Of the Punishment of Crime.

The principal methods by which the State can *punish* persons convicted of crime are death, bodily torture, imprisonment, and forfeiture of property. In our modern States bodily torture, though once common, is rarely inflicted; but death, imprisonment, and forfeiture are still retained. The *penalty of death* was formerly employed with various painful aggravations to meet different degrees of crime; and to *imprisonment* conditions of solitude, hard labor, and other privations are annexed for the same purpose. *Forfeiture* has been enforced, in reference to some crimes, against the entire estate of the offender; in reference to other crimes it has been restricted to certain species of property or to a pecuniary fine. In this country the whole matter, within the limitations fixed by the Federal and State Constitutions, is regulated by local statutes.

Rem. As the sole power of the State to enforce its laws resides in its ability to inflict penalties for their disobedience it might be expected that, after sixty centuries of experience, human wisdom would have been able to devise some effective system of punishments for crime. But the problem appears now as far from settlement as ever. The question is not one of maudlin sentiment, or of racial prejudice, or of insane altruism, but of practical public policy; and as the State has the unchallenged right to exterminate criminals and criminal classes if necessary to its own protection, and possesses a physical power equal to its right, there is no solid reason, in the nature of things, why the problem should not long since have been solved. But until the nations realize that the State punishes past crimes not in order to vindicate abstract justice, nor to reform an already guilty criminal, but only to prevent future crimes; and that future crimes can be prevented only by destroying the inducement and the capacity to perpetrate them; no sound and practically useful conclusion is likely to be reached. The principal incentives to crime are, and always have been, some form of avarice or lust. When crimes born of *avarice* are punished by compelling the criminal to make full restitution, either in value or in penal servitude, so that under an efficient administration of the laws it would become impossible for the criminal to profit by his crime; and when crimes of *lust* are punished by inflicting bodily pain exceeding the anticipated pleasure, and in grievous cases by surgically depriving the convicted criminal of the capacity to repeat the crime,—the power of the State to prevent crime will become manifest, and the present cumbrous, uncertain, expensive, and almost fruitless system will disappear.

READ: 4 Bl. Com., pp. 7–19;
Clark, Elementary Law, § 93;
Desty, Criminal Law, §§ 46–55 *b*;
Kenney, Criminal Law, pp. 24–32, 130–132;
1 Bishop, Criminal Law, §§ 927–977;
Wharton, Criminal Law, §§ 1–13;
Beccaria, Crimes and Punishments;
1 Woolsey, Political Science, pp. 324–381.

§ 476. Of the Classification of Crimes: Treason; Felony; Misdemeanor.

In England, in ancient times, the relative severity of penalties was estimated in the following order; (1) Death in an aggravated form, with the forfeiture of the entire estate; (2) Forfeiture of lands or goods, or both, with or without death according to the enormity of the offence; (3) Forfeiture of a portion of the goods

of the offender or his imprisonment, The first was inflicted only for the highest of all crimes, — *treason* against the State. The second was applied in a great variety of the more heinous offences which, because of the forfeiture it contained, were called *felonies*. The third was imposed for minor offences called *misdemeanors*. This gradation of penalties naturally led to the classification of crimes on the same basis, and became the ground of distinctions of great legal importance. At the time it originated the entire forfeiture of property was regarded as a penalty so severe, and so far reaching in its effects, as to be even worse than death, and to demand the greatest caution from the courts in its infliction. Hence, the prosecution of crimes for which it might be imposed was hedged about with numerous technicalities, unknown to the proceedings for lesser crimes. These technicalities were relaxed to some extent in accusations for treason, on account of its enormity and the necessity of exterminating the direct domestic enemies of the State; but in regard to felonies they were carried to an extreme degree, especially in reference to the comparative responsibility of the various participants in the criminal act, the methods of arrest, the form of complaint or indictment, the rights of the accused during their trial, and the merger of offences. In later times, though forfeiture has come to be regarded as an evil of less consequence, yet these peculiar methods of procedure in reference to felonies to some extent survive, and this renders the grouping of crimes into these three classes a permanent feature of our law.

Rem. Although the former classification of crimes into treason, felonies, and misdemeanors still remains, the individual crimes which constitute the groups are not the same. Many ancient felonies have been reduced by law to misdemeanors, and many misdemeanors elevated into felonies. In some States, all offences are misdemeanors except treason, unless expressly declared felonies by statute. In other States, all crimes punishable by death, or by imprisonment for life, or by imprisonment in the States-prison, are regarded as felonies. Other States recognize the more important felonies of the English law, such as murder, manslaughter, arson, rape, robbery, burglary, and theft, as felonies by their unwritten law; and add to the group by their written law such other offences as seem to require the same penalties or modes of prosecution.

READ: 4 Bl. Com., pp. 74, 94–102;
Walker, American Law, § 257;
Hawley, Criminal Law, pp. 96–99;
Desty, Criminal Law, §§ 2–4 *b*;
May, Law of Crimes, §§ 9–11;
Clark and Marshall, Criminal Law, § 3;
Clark, Criminal Law (Tiffany Ed.), §§ 7, 9, **10;**
Kenney, Criminal Law, pp. 84–92;
1 Russell on Crimes, pp. 192–195;
Archbold, Criminal Procedure, pp. 1–5;
1 Bishop, Criminal Law, §§ 607–623;
Wharton, Criminal Law, §§ 21–24;
McClain, Criminal Law, §§ 17–20.

§ 477. Of Common Law Crimes and Statutory Crimes.

Crimes may be *defined and prohibited* either by the unwritten or the written law. The prohibitions and definitions of the unwritten law are found in the decisions of the courts, and in the treatises of recognized authority; those of the written law in constitutions, treaties, and statutes. Grave crimes are usually forbidden by the unwritten law as individual offences; those of less importance as members of a class of wrongs which, as a class, have been judicially determined to be prejudicial to the State. The comprehensiveness of the unwritten law in reference to crime depends upon this latter mode of prohibition. By deciding that breaches of the peace, obstructions of public justice, injuries to public health, and other general groups of acts are crimes because of their evil influence upon the welfare of the State, it provides a method for the punishment of every act producing these effects, without requiring a new definition and command for every new wrong of these classes which the ingenuity and malice of offenders might devise. The written law explains, applies, and extends the definitions and prohibitions of the unwritten law; and adds to its provisions such new commands as varying social conditions may require. In some of our States the written law has occupied the entire field of criminal jurisdiction, and the unwritten law creates no crimes. In other States it serves only to interpret the language which it has furnished to the written law, or to supply some unforeseen emergency for which the written law is unprepared. In the administration of the government of the United States, within the areas of the several States, all its criminal enactments are

embodied in its written law, though in the territories over which it possesses an exclusive sovereignty its own unwritten law also prevails. How far the Federal legislation may define and prohibit criminal actions and omissions within the limits of the different States is settled by the Constitution, and by the nature of the United States as the supreme sovereign charged with the conduct of all national affairs. Of those over which the Federal jurisdiction is not necessarily exclusive the individual States take cognizance in their written and unwritten laws.

Rem. All written criminal laws are subject to *two constitutional restrictions:* (1) That no cruel and unusual punishments shall be imposed; (2) That no *ex post facto* laws shall be enacted. A *cruel and unusual punishment* is one as yet unknown to the law, and whose method or severity is shocking to the moral sense of the general public. An *ex post facto law* is a law prescribed after the commission of the act in question, either changing it from an innocent act into a crime; or aggravating its degree; or increasing its penalty; or depriving its perpetrator of some power or privilege which might have been available to him under the former law if he had then been prosecuted for his crime. A law, though *ex post facto* as to past transactions, is valid as to those occurring after its enactment.

READ: Hawley, Criminal Law, pp. 44–66;
May, Law of Crimes, §§ 2–4;
Clark and Marshall, Criminal Law, §§ 32–53;
Clark, Criminal Law (Tiffany Ed.), §§ 4–6;
1 Bishop, Criminal Law, §§ 279–284;
Wharton, Criminal Law, §§ 25, 26;
McClain, Criminal Law, §§ 12–15, 23–73, 74–80.

SECTION III

OF THE PERPETRATORS OF CRIME

§ 478. Of Principals in the First Degree.

Persons engaging in a criminal enterprise become related to the criminal act either as Principals or as Accessaries. A *principal* is one who participates in the performance of the criminal act. Principals are of two degrees. A *principal in the first degree* is he who commits the act, either directly by himself or through an innocent agent. If several acts are necessary to complete the crime, and each is performed by a separate person

in pursuance of the common purpose, all these persons are principals in the first degree.

Rem. A principal in the first degree need not be present in the *place* where the criminal act is consummated; nor, if he employs an irresponsible agent, in the place where the act is committed, or its consequences are produced. Thus to send by mail to a distant State a poison, which is taken by and causes the death of the recipient, is a direct act of killing in the State where the death occurs. To despatch an infant or insane messenger into a foreign country, there to perpetrate a felony, makes the felony when perpetrated the immediate criminal act of him by whose command it was performed.

READ: 4 Bl. Com., pp. 34, 35;
Walker, American Law, § 255;
Clark, Elementary Law, § 92;
Hawley, Criminal Law, pp. 80, 81;
Desty, Criminal Law, § 36;
May, Law of Crimes, § 69;
Clark and Marshall, Criminal Law, §§ 163–169, 186–196;
Clark, Criminal Law (Tiffany Ed.), §§ 43–46, 52, 53;
Kenney, Criminal Law, pp. 77–79;
1 Russell on Crimes, p. 161;
Archbold, Criminal Procedure, pp. 55–58;
Wharton, Criminal Law, §§ 205–210;
McClain, Criminal Law, §§ 199–204.

§ 479. Of Principals in the Second Degree.

A *principal in the second degree* is one who does not himself commit the act, but who, in pursuance of a common purpose with the principal in the first degree, is actually or constructively present when it is committed, and then and there aids and abets the principal in the first degree. Any assistance or readiness to assist, if manifested by an overt act, constitutes an *aiding and abetting.* A person is *actually present* at the commission of a crime when he is at the *place* where the crime is committed at the *time* when it is being committed. He is *constructively present* when he is so situated, with reference to the place where the crime is committed, while it is being committed, as to be able, if necessary, to assist therein by giving an alarm or otherwise.

Rem. As there can be no principal in the second degree without a principal in the first degree it is essential, in prosecuting the former, to prove the guilt of the latter. Hence, in order to

avoid the possible absurdity of first convicting the principal in the second degree, and afterwards acquitting the principal in the first degree, arose the rule that no prosecution should be instituted against the principal in the second degree until after the principal in the first degree had first been arrested, prosecuted, and convicted. This rule, leading to the escape of many evidently guilty principals in the second degree, because the principal in the first degree had fled beyond the reach of process, has led some States to abolish the distinction altogether, and treat the principal in the second degree as the perpetrator of an original and separate crime.

READ: Hawley, Criminal Law, pp. 81, 82;
Desty, Criminal Law, §§ 37–39;
May, Law of Crimes, § 69;
Clark and Marshall, Criminal Law, §§ 170–175;
Clark, Criminal Law (Tiffany Ed.), §§ 47, 50, 51;
Kenney, Criminal Law, pp. 79, 80;
1 Russell on Crimes, pp. 161–169;
Archbold, Criminal Procedure, pp. 58–65;
1 Bishop, Criminal Law, §§ 644–659;
Wharton, Criminal Law, §§ 211–224;
McClain, Criminal Law, §§ 193–198, 205, 206.

§ 480. Of Accessaries before the Fact.

An *accessary* is one who does not participate in the performance of the criminal act, but who concurs in or sanctions it, and either in some way contributes to its commission or endeavors to prevent its punishment. Accessaries are either Accessaries before the Fact, or Accessaries after the Fact. An *accessary before the fact* is one who neither commits the act nor aids and abets in its commission, but who before the act is performed contributes to its commission by procuring, advising, or encouraging the principal to perform it. An accessary before the fact may or may not be the original contriver of the crime, but must at the time when he contributes to the crime entertain the purpose, and contemplate the consequences, which are realized by the commission of the criminal act. Encouragement given and withdrawn in time to enable the principal to refrain from the perpetration of the act does not contribute to its performance; for if the principal then proceeds to its commission he is alone responsible; if he abandons the design there is no act to which the instigator could have been accessary. But a repentance too

late to be effective does not release the accessary from the guilt incurred by his original intention and enticement to the act.

Rem. The distinction between principals and accessaries is recognized only in reference to felonies. In treason all the parties entertain the treasonable purpose and share in the moral and political guilt, and in their favor the law makes no nice distinctions but treats all of them as principals. In misdemeanors, on account of their general insignificance, the law does not consider the nearness or remoteness of the actors in reference to the act, but prosecutes as principals all whom it deems it expedient to punish.

READ: 4 Bl. Com., pp. 35–37;
Hawley, Criminal Law, pp. 82–86;
Desty, Criminal Law, §§ 40–43;
May, Law of Crimes, §§ 70, 71–76;
Clark and Marshall, Criminal Law, §§ 176–180;
Clark, Criminal Law (Tiffany Ed.), § 48;
Kenney, Criminal Law, pp. 80–82;
1 Russell on Crimes, pp. 170–176;
Archbold, Criminal Procedure, pp. 65–73;
1 Bishop, Criminal Law, §§ 660–689;
Wharton, Criminal Law, §§ 225–240;
McClain, Criminal Law, §§ 207, 208.

§ 481. Of Accessaries after the Fact.

An *accessary after the fact* is one who neither participates in the commission of the act, nor contributes to it before it is committed, but who after its commission unlawfully aids the guilty actor in evading punishment. The law provides a method in which an alleged criminal can meet and defend himself against the charge, and to assist him in making this defence is not unlawful. But for one who knows his guilt to aid him in eluding arrest, or in escaping from custody, is so high a crime that even a husband or a parent cannot excuse it by any feeling of affection or solicitude for the accused; and even a wife can justify it only on the ground of the presumed coercion of her husband. Mere acts of charity not conducing to the obstruction of the course of justice, such as feeding a criminal in prison and the like, are not unlawful; nor does assistance to a fleeing culprit charge his aider with a share in his offence, unless the offence is then completed and the aider knows of its commission.

Rem. Accessaries, whether before or after the fact, cannot usually without their own consent be tried before the trial and

conviction of their principals, — a difficulty which, in the local laws of several of our States, is avoided by treating them as principals. Indeed, the universal modern tendency is to ignore this separation of the criminal actors into different relations to the act, once so important a protection against the extreme penalties of felony; and as in treason and misdemeanors to regard them as of equal and independent guilt.

READ: 4 Bl. Com., pp. 37–39;
Hawley, Criminal Law, pp. 86–90;
Desty, Criminal Law, §§ 44, 45;
May, Law of Crimes, § 70;
Clark and Marshall, Criminal Law, §§ 181–185;
Clark, Criminal Law (Tiffany Ed.), § 49;
Kenney, Criminal Law, pp. 82, 83;
1 Russell on Crimes, pp. 176–191;
Archbold, Criminal Procedure, pp. 73–79;
1 Bishop, Criminal Law, §§ 690–708;
Wharton, Criminal Law, §§ 241–244;
McClain, Criminal Law, §§ 209–218.

CHAPTER II

OF PARTICULAR CRIMES

§ 482. Of the Classes of Particular Crimes.

Particular crimes have been variously arranged in classes, sometimes according to their mode of punishment, as treason, felony, and misdemeanor; sometimes according to the character of the criminal act, as including or not including a specific intent; sometimes according to their consequences, as primarily affecting private individuals, or the State, or the public at large. Of these the first is accidental and unstable, since modes of punishment are subject to continual change, and the same crime may thus at one time be a felony and at another time a misdemeanor. The second rests upon essential differences in the crimes themselves as they have been defined by law, but upon no broad and permanent distinctions in the nature of things which the law is not at liberty to disregard. The third alone is founded on the intrinsic and invariable attributes of the crimes as invasions of public or of private rights, and is commonly adopted by modern jurists, who divide crimes into four classes: (1) Crimes against the State; (2) Crimes against the Public Welfare; (3) Crimes against the Persons of Individuals; (4) Crimes against the Property of Individuals.

Rem. In this classification the State is considered in its corporate capacity only, as a political body legally distinguishable from the public or people of whom it is composed; and therefore possessing rights and susceptible to wrongs which the public at large cannot enjoy or sustain. Thus an act which really injures no physical person either public or private may, like some forms of treason, be a crime of the highest magnitude against that ideal person, the State.

READ: May, Law of Crimes, §§ 13–17;
Clark and Marshall, Criminal Law, §§ 19–31;
Kenney, Criminal Law, pp. 93, 94;
Archbold, Criminal Procedure, pp. 5–8;
1 Bishop, Criminal Law, §§ 443–449.

SECTION I

OF CRIMES AGAINST THE STATE

§ 483. Of Crimes against the Sovereignty of the State.

A crime which directly attacks the State tends to destroy or impair its *sovereignty,* either as a member of the family of nations or as the supreme ruler over its own people and its internal affairs. Any act on the part of a citizen which, unless disavowed and punished by the State, places it in the attitude of a violator of international obligations subjects it to the danger of reprisal and possibly of war, and thus imperils its external sovereignty. Any act which attacks the authority of the State over its own people, or seriously interferes with its administration of its domestic affairs, diminishes or nullifies its internal sovereignty. Hence crimes directly against the State are of two species: (1) Crimes against its External Sovereignty; and (2) Crimes against its Internal Sovereignty.

Rem. The rules of international law can be enforced only by the concerted action of the family of nations as a whole, or by the action of each nation in reference to its own subjects. The former method is rarely practicable or necessary; and hence each individual nation is often called upon to exercise its external sovereignty not merely to protect its own rights, but to defend and vindicate the rights of other sovereign States. For this reason an offence against a foreign State becomes in many cases an indirect attack upon the external sovereignty of the State to which the offender himself belongs, and therefore is justly punished by it as a crime.

READ: 1 Bishop, Criminal Law, §§ 450–480.

ARTICLE I

OF CRIMES AGAINST THE EXTERNAL SOVEREIGNTY OF THE STATE

§ 484. Of International Crimes.

The law of nations is a part of the municipal law of every State within the family of nations, and binds the individual citizen as well as the political society to which he belongs. The rules which govern international intercourse in times of peace,

and fix the rights and duties of belligerents and neutrals in times of war, extend in many particulars to the conduct of the members of the commonwealth, and their prohibitions thus become a portion of its criminal law. Frequently, these prohibitions are formally adopted into the domestic legislation of the State, and there the crimes are redefined, forbidden, and provided with a suitable penalty. In this country such legislation proceeds from the Congress of the United States, in whose courts also all these offences must be prosecuted.

Rem. The principal acts affecting foreign nations which are expressly forbidden by our own laws are: (1) The violation of safe-conducts or passports issued under the authority of the United States to the citizens of any foreign State; (2) Unlawful interference with the persons or property of the diplomatic representatives of foreign States; (3) The publication of seditious libels tending to bring into contempt the governments of foreign States, or their ambassadors and ministers; (4) The forgery or counterfeiting of the coins or notes or bonds of foreign States; (5) The organization of military or naval expeditions, or the enlistment of soldiers, to serve against a friendly foreign State; (6) The infringement of rights secured by treaty to any foreign State or its inhabitants. Besides these, many lesser offences of the same general character are from time to time forbidden by the Federal Statutes.

READ: 4 Bl. Com., pp. 66–71;
Woolsey, Int. Law, § 176;
Davis, Int. Law, pp. 69–74;
Desty, Criminal Law, §§ 61–62 *a*;
Clark and Marshall, Criminal Law, §§ 482, 484, 485;
Archbold, Criminal Procedure, pp. 1694–1696;
1 Bishop, Criminal Law, §§ 481–485;
Wharton, Criminal Law, §§ 1871–1908;
McClain, Criminal Law, §§ 1341–1346.

§ 485. Of Crimes against All Nations: Piracy: Slave Trade.

International crimes are perpetrated by the subjects of one of two nations against the other. *Piracy*, on the contrary, is committed by persons who are regarded as the subjects of no nation, but as universal enemies, warring against the honor, morality, and interests of all civilized States. Piracy includes every act of robbery or forcible depredation upon property on the high seas, or on waters not within the jurisdiction of any

particular State or on the shores of such waters, by persons who roam the seas in vessels not lawfully commissioned by any State with the intent and purpose to seize and appropriate the ships or other property of citizens of every nation, and in a spirit of general hostility to all mankind. Pirates, in this sense, are at war with the whole world, and may be pursued, captured, and punished by any nation within whose power they chance to come. The *slave trade* is made piracy by treaties between England and several other nations, and as to the subjects of those nations who engage in that traffic the law of piracy applies. Whether it falls within the definition of piracy given by the law of nations would seem to depend upon the national character and relations of the persons who are seized and sold as slaves. Where such persons belong to no organized community which is recognized by the law of nations, — as was the case in the African slave trade, — their captors and vendors cannot be regarded as universal enemies, at war with all nations, and therefore have been uniformly held not to be pirates under the general rules of international law. But where the citizens of established States are kidnapped and carried into slavery by marine depredators, who are acting without a commission from any sovereign who can be held responsible for their invasion, there appears to be no real distinction between their offence and that which always has been treated as the crime of piracy.

Rem. In this country the crime of piracy has been extended by statute to cover certain acts of violence by seamen, preventing the master from defending his vessel or cargo against enemies; all offences on the seas which if committed on the land would be punishable with death; and all acts of hostility on the high seas against the United States or any of its citizens under color or pretence of any foreign authority, or in defiance of treaty obligations. Such crimes are cognizable only in the courts of the United States.

READ: 4 Bl. Com., pp. 71–73;
1 Kent Com., Lect. ix, pp. 183–200;
Wheaton Int. Law, §§ 122–124;
Wharton, Int. Law, §§ 380–382;
Pomeroy, Int. Law, § 188;
Glenn, Int. Law, §§ 73–77;
Woolsey, Int. Law, §§ 144–146;

Hawley, Criminal Law, pp. 241–244;
Clark and Marshall, Criminal Law, § 483;
Clark, Criminal Law (Tiffany Ed.), § 161;
1 Russell on Crimes, pp. 260–268;
Archbold, Criminal Procedure, pp. 1445–1463, 1857;
2 Bishop, Criminal Law, §§ 1057–1063;
Wharton, Criminal Law, §§ 1860–1869;
McClain, Criminal Law, § 1359.

Article II

Of Crimes Against the Internal Sovereignty of the State

§ 486. Of Treason.

Treason is an attempt, successful or otherwise, to overthrow and destroy the State itself. It includes both an external act and a specific intent. The external act may consist either of words or conduct. The specific intent is the intelligent and wilful purpose to subvert the sovereignty or terminate the existence of the State. Treason, being an attack upon the life of that political personality on whose maintenance all other rights depend, is the highest of all crimes, and in all forms of society has deservedly been treated with great severity.

Rem. Under the earlier English law treason embraced a great variety of offences, to which were added, by forced judicial constructions, many actions which were never before suspected to be treasonable. By the Act 25 Edward III, ch. 2 (A. D. 1350–51) these numerous treasons were *reduced to seven:* (1) To compass or imagine the death of the king or queen, or of their eldest son or heir; (2) To violate the king's consort, or his eldest daughter unmarried, or the wife of his eldest son or heir; (3) To levy war against the king within the realm; (4) To adhere to the king's enemies within the realm and give them aid and comfort; (5) To counterfeit the king's great or privy seal; (6) To counterfeit the king's money, or to bring false money into the kingdom; (7) To kill the chancellor, treasurer, or a judge, while in the discharge of his office. Afterwards, however, in the reign of Henry VIII, the spirit of inventing new and strange treasons was revived, and this crime was held to embrace such acts as calling the king names in a public writing, marrying his nephew or niece without his permission, or impugning his ecclesiastical supremacy. By the Statute 1 Mary, ch. 1 (A. D. 1553), these new forms of treason were again abrogated, and the Act of Edw. III

was reaffirmed. But in the succeeding reigns the number was once more increased, and until the year 1847–48 included "the intending, within the realm or without, of any restraint of the heirs or successors of the king, and expressing such intention by any published writing, or by any overt act or deed." The history of our law is thus pregnant with the warning that every disposition to create new treasons is prophetic of impending despotism.

READ: 4 Bl. Com., pp. 75–93:
Kenney, Criminal Law, pp. 248–259;
Archbold, Criminal Procedure, pp. 1641–1643;
2 Bishop, Criminal Law, §§ 1202–1213;
Clark, Criminal Law (Tiffany Ed.), § 8;
Wharton, Criminal Law, §§ 1782–1789;
McClain, Criminal Law, §§ 1354–1356;
Bolles, Important English Statutes, p. 18, *Act 23 Edw. III, Defining Treason.*

§ 487. Of Treason against the United States: Levying War.

The Constitution of the United States provides that treason against the United States shall consist only in levying war against them, or in adhering to their enemies giving them aid and comfort. To *levy war* against the United States is to assemble a body of men in order to effect, by force, a treasonable purpose. The number assembled is not material, nor is it necessary that any armed interference with the operations of the State occur; the assembling with a treasonable purpose constitutes and completes the crime. A *treasonable purpose* is a specific intent to attain, by means of force or intimidation, some end of a public nature, — such as to overthrow the existing government, or totally to nullify some legislative act, or to hinder its execution, or to compel its repeal. Resistance to public officers or defiance of the law for merely private ends are crimes against the public welfare, but are not treason. When war is actually levied all persons who perform any part therein, however minute and however remote from the scene of action, if they are leagued in the general conspiracy are guilty of treason.

Rem. This provision of the Federal Constitution sharply distinguishes between those two of the seven treasons, recognized by the Act of Edw. III, which attack the State itself and the five which are directed at the persons of its rulers, or at the mere instruments of its sovereignty; and is thus in harmony with our fundamental conception that the State is the organized political

society, and not the individuals or agencies by whom, for the time being, its affairs may chance to be conducted. Any attempt, therefore, to elevate into the crime of treason an attack which terminates merely upon the person of a public officer, and does not affect the corporate personality of the State itself, is a return to anti-American ideas, and a retrogression into European despotism.

READ: Hawley, Criminal Law, pp. 115–117;
Desty, Criminal Law, § 66 *b*;
May, Law of Crimes, §§ 130–139;
Archbold, Criminal Procedure, pp. 1648–1651;
2 Bishop, Criminal Law, §§ 1214–1231;
Wharton, Criminal Law, §§ 1790–1800;
McClain, Criminal Law, § 1357.

§ 488. Of Treason against the United States: Adhering to the Enemy.

The *enemies of the United States*, in reference to the crime of treason, are the belligerent forces of a foreign State with which the United States is engaged in war, and foreign pirates or robbers who, without authority from any particular State, have invaded the United States. Domestic robbers and pirates, or insurgents prosecuting a rebellion, are criminals, and may be guilty of levying war against the United States, but are not its "*enemies*," as the term is here employed. To *adhere to the enemy*, giving them aid and comfort, is to render voluntary assistance to them in their belligerent operations; as by uniting with them in their acts of hostility against the United States or its allies; or by delivering up to them its fortresses or ships of war; or by enlisting in their ranks though no acts of hostility afterwards occur; or by raising troops for their army or navy; or by furnishing them with money, arms, or intelligence, even though such supplies should be intercepted or the intelligence should never reach them.

Rem. Acts of assistance to the enemy, if *performed unwillingly* under a well-grounded fear of immediate death or grievous bodily harm in case of refusal, are regarded by the law as without criminal intent, and therefore excusable. But the fear of lesser evils, such as the loss of property, does not discharge the actor from responsibility, though it may be shown in evidence upon the question of his treasonable purpose, and to qualify the measure of his punishment.

READ: Hawley, Criminal Law, p. 117;
Desty, Criminal Law, § 66 *c*;
May, Law of Crimes, §§ 130–139;
Clark, Criminal Law (Tiffany Ed.), §§ 158–160;
Archbold, Criminal Procedure, pp. 1651–1652;
2 Bishop, Criminal Law, §§ 1232–1234;
Wharton, Criminal Law, §§ 1801–1803 *a*.

§ 489. Of Treason against the United States: the Overt Act.

The Constitution of the United States further provides that no person shall be convicted of treason, unless on the testimony of two witnesses to the same *overt act*, or a confession in open court. The term *overt*, as predicated of an act of treason, signifies that the act is open and apparent, thereby distinguishing it from a mere mental purpose or conception; and without such act there can be no treason on the part of any person, nor when treason is actually committed by some person can any other person be a participator therein unless his act of participation is also overt. The constitutional provision as to the proof by which this act must be established was adopted in order to prevent a conviction for treason, and the infliction of its extreme penalties, in cases where the crime had been intended by the accused but had fallen short of actual completion.

Rem. Where the treason consists *in levying war* the act of treason must, at least on the part of some of the conspiring traitors, be not only an open act but a *physical act*, since no common intention subsisting in the minds of the parties, and no oral or written agreement in pursuance of such intention, amounts to this form of treason until so far carried into effect that some of the parties assemble together, with the immediate purpose to proceed at once to accomplish their treasonable design. But in *adhering to the public enemy* the treasonable act may be completed by *words alone*, as where the crime consists in the oral communication of intelligence which may be useful to the enemy in its belligerent operations.

READ: Coke, Third Institute, pp. 12–14;
Desty, Criminal Law, §§ 66–66 *a*, 67;
Kenney, Criminal Law, pp. 259–261,
2 Bishop, Criminal Law, § 1231;
Wharton, Criminal Law, § 1793;
McClain, Criminal Law, § 1358.

§ 490. Of Treason against the Individual States of the American Union.

Treason may be committed against a *single State* of the American Union as well as against the United States. In the absence of constitutional and statutory provisions defining and forbidding it such treason is an offence against the unwritten law of the State, and consists either in levying war against the State or in adhering to its public enemies. Other acts may be made treasonable by the provisions of the local law.

Rem. It has been held that where the same act is treasonable both against the individual State and the United States, it is a crime only against the United States. This might be true of an adhering to the public enemy, except in those cases of sudden invasion where the Federal Constitution recognizes the right of a single State to engage in war for its own protection. *Insurgent citizens* may, however, levy war against an individual State without attacking the United States, and thus be guilty of treason against the State alone.

READ: Archbold, Criminal Procedure, pp. 1652–1655;
2 Bishop, Criminal Law, § 1254;
Wharton, Criminal Law, §§ 1812–1819.

§ 491. Of Persons Capable of Treason.

The essence of treason is the breach of that allegiance which the subject owes to the State, and hence no one can be guilty of this crime whose sole allegiance is due to a foreign State. It has been claimed that *resident aliens*, though owing a local and temporary allegiance to the nation wherein they dwell, are not capable of treason. But later decisions have determined, in harmony with the English rule, that a resident alien levying war against the United States, or adhering to its enemies when such enemies are not the military forces of the State to which the alien owes his permanent allegiance, is guilty of treason; and that, in the event of war between his country and our own, he must either preserve a strict neutrality, or openly espouse the hostile cause and identify himself with the enemy, at the peril of being treated as a traitor or a spy.

Rem. Non-resident aliens levying war against the United States, or adhering to its enemies, commit no offence when their

own State is at war with the United States. When their own State is at peace with the United States, these acts may violate the law of nations, but are not treason. Where the actors belong to no State they may be pirates or robbers, but they are not traitors.

READ: Hawley, Criminal Law, p. 117;
2 Bishop, Criminal Law, §§ 1235, 1236;
Wharton, Criminal Law, §§ 1805–1811.

§ 492. Of Misprision of Treason.

Misprision of treason is the wilful concealment of a known treason, by a person who neither assents to nor takes part in its commission. It is the duty of every individual who becomes cognizant of any treasonable act already perpetrated against the State to which his allegiance is due, or of the purpose of other parties to perform such treasonable act, to give *immediate notice* to the proper authorities, in order that the act may be prevented or the offenders captured and punished. In the United States this notice should be given to the President or the governor of the State, or to some judicial officer; and the failure to do so is a crime of only less gravity than the treason itself.

Rem. *Misprision* signifies the neglect or voluntary breach of some duty which the citizen owes the State. The term is used in criminal law to denote a certain relation to felonies and treason, next below that of accessaries before and after the fact. An accessary not only has a guilty knowledge, but in some manner influences the actor to commit the act or aids him to escape its consequences. Guilty knowledge alone is sufficient for misprision. In punishing it the State reaches the most remote of all those persons who can, with any reason or justice, be held responsible for the perpetration of the crime.

READ: 4 Bl. Com., pp. 119–121;
Hawley, Criminal Law, pp. 117, 118;
Desty, Criminal Law, § 66 *d*;
Kenney, Criminal Law, pp. 261, 262;
Archbold, Criminal Procedure, pp. 1643, 1644;
1 Bishop, Criminal Law, §§ 716–722;
Marshall's Decisions, pp. 52–81 (4 Cranch, pp. 75–137), pp. 82–165 (4 Cranch, App., pp. 470–507).

§ 493. Of Sedition.

Sedition is an act, not amounting to treason, committed with the intent to bring into contempt or hatred either the

State itself or its rulers, or its established political institutions. It may take the form of a conspiracy to perpetrate acts which, if perpetrated, would be treason; or of words, spoken or written, calculated to excite such acts in others; or of preparations and attempts in contemplation of a future treasonable act. In times of public agitation such acts are common, and in the state of popular feeling are often very dangerous, requiring prompt and stringent measures to prevent them from developing into open treason.

Rem. The details of these seditions, conspiracies, and libels are generally defined by statute. Otherwise too liberal an interpretation given to the word "*sedition*" by the courts might unreasonably restrict the liberty of the citizens to organize, protect, and engage in active efforts for the necessary redress of grievances.

READ: Cooley, Const. Law, pp. 108, 109;
Desty, Criminal Law, §§ 69–69 *b*.

§ 494. Of Crimes against the Administration of Government.

All offences which interfere with the State in the discharge of its legislative, executive, or judicial functions are crimes against its internal sovereignty. What actions and omissions constitute such crimes it is for the State to decide, from time to time, in view of their effect upon its maintenance of its own honor and authority, and upon the welfare of its people. Hence these crimes are, for the most part, of statutory definition only, though the groups to which they belong are necessarily more or less permanent in the law. In this country these statutes are in some instances Acts of Congress; in others, the enactments of the legislatures of the individual States. Frequently the same act may be a crime against both sovereignties, and be punishable in each as a distinct offence.

Rem. Of the groups of crimes forbidden by these Federal or local statutes the most general and important are the following: (1) Malfeasance in office on the part of legislative, executive, or judicial functionaries; (2) Open and defiant contempt of legislatures and courts in their presence while in session; (3) Unwarranted interference with the affairs of State by giving improper information to foreign governments, or by endeavoring to preju-

dice their action toward the United States; (4) Counterfeiting the coin of the realm, and breach of the revenue laws by smuggling or fraudulent imposition; (5) Violations of the postal laws by tampering with the mails, or using them for illicit purposes; (6) Misprision of felony; (7) Refusal to assist executive officers in the performance of their duties, when properly and lawfully called upon to aid in suppressing riots, capturing felons, arresting conflagrations, or meeting other public emergencies; (8) Destroying munitions of war, fortresses, vessels belonging to the navy, or other public property necessary for the protection and defence of the State; (9) Infringement of the rules of military and martial law by persons to whom, on account of their official relation to the State or of the locality in which they dwell, such rules apply; (10) Violations of the laws governing the elective franchise.

READ: 4 Bl. Com., pp. 121–126;
Hawley, Criminal Law, pp. 253–257;
Desty, Criminal Law, §§ 70–70 *j*, 73–73 *d*;
May, Law of Crimes, §§ 154–158;
Clark and Marshall, Criminal Law, §§ 442–444;
1 Russell on Crimes, pp. 883–888;
Archbold, Criminal Procedure, pp. 1682–1694, 1848–1851;
2 Bishop, Criminal Law, §§ 240 *a*–273;
Bishop, Statutory Crimes, §§ 802–843;
Wharton, Criminal Law, §§ 1822–1848;
McClain, Criminal Law, §§ 9, 941–951, 1327–1340, 1347–1353.

SECTION II

OF CRIMES AGAINST THE PUBLIC WELFARE

§ 495. Of the Public Welfare.

The *public welfare* consists in the enjoyment by the people at large of those benefits which political institutions are intended to bestow. These benefits are the protection of life, health, liberty, property, and family rights, through the enactment and enforcement of laws which preserve peace and order in society, promote good morals, secure freedom and fair dealing in business enterprises, prevent or remove conditions dangerous to bodily comfort and safety, and provide adequate methods for the redress of private injuries. Any interference with the efforts of the State to accomplish, through these means, its duty to its citizens is a wrong not only against the particular person who may suffer therefrom, but against the

whole public whose general welfare is imperiled whenever the rights of any of its members are invaded with impunity; and hence acts of this character are, as they should be, ordinarily punishable as crimes. Such acts are very numerous and vary with the conditions of society. Those which are more permanent are usually classified under five heads: (1) Crimes against the Public Peace; (2) Crimes against Public Policy; (3) Crimes against Public Trade; (4) Crimes against Public Health; (5) Crimes against Public Justice.

Rem. The *welfare of the State* is the welfare of the people of whom it is composed. Individuals, indeed, may flourish while the State decays, but the condition of the people at large measures the advancement or degeneration of the community to which they belong. Every wrongful act affecting any member of the State is, therefore, to be judged not by the consequences which it *does* produce in a particular instance, but by the consequences which it *would* produce were it permitted to become general; and the criminal instincts which prompt it are to be suppressed by penalties severe enough to neutralize the influence of bad example and profitable crime, lest the contagion spread throughout the commonwealth, and the neglect to punish one apparent wrong operates as a stimulus to all other evil-minded persons to gratify their criminal desires.

READ: Desty, Criminal Law, § 91;
Clark, Criminal Law (Tiffany Ed.), § 148.

ARTICLE I

OF CRIMES AGAINST THE PUBLIC PEACE

§ 496. Of Riot, Rout, and Unlawful Assembly.

A crime against the *public peace* is an act by which the peace and order of society are disturbed. Of these crimes a *riot* is the most flagrant and atrocious. It consists in the public performance of some unlawful act of violence, or of some lawful act in a violent and tumultuous manner, by three or more persons who are congregated together for that purpose. A *rout* is an incipient riot. It consists in the congregating together of three or more persons for the purpose of doing some act which, if done, would be a riot, and the taking of some definite steps toward its accomplishment. It differs from a riot in that the riotous purpose is not fully expressed in an unlawful

act of violence, though something is done toward its realization. An *unlawful assembly* is the congregating together of three or more persons for the purpose of doing some act which, if done, would be a riot, but without taking any active steps in reference thereto. Such an assembly need not intend any specific mischief; if its general designs are turbulent, and by its numbers, appearance, or place of meeting it is calculated to excite public alarm, it is unlawful.

Rem. It is of the essence of a *riot* that the act itself, or the mode of its performance, should be calculated to excite terror in the minds of persons of ordinary fortitude, other than the rioters. It is not necessary that the intent to do the riotous act should have existed before the actual assembly of the rioters; for a peaceable and lawful assembly may, by the subsequent formation of a riotous design and the commission of the riotous act in pursuance thereof, become a riot. All persons who engage in inciting others to a riot, which subsequently takes place as the result of such incitement, though they may be absent when the riotous acts are finally performed; all who unite themselves with the assembly after the riot has commenced, and assist therein; all who are present in the assembly, and fail to leave it after due notice to disperse from the public authorities; and all who, being constructively but not actually present, aid and abet the rioters, — are responsible not merely for the precise act originally intended by the riotous assembly, but for every other act to which it naturally leads, however heinous and unexpected that act may be, and even though such act may have been committed without their personal knowledge and participation.

READ: 4 Bl. Com., pp. 142, 143, 146, 147;
Hawley, Criminal Law, pp. 266–269;
Desty, Criminal Law, §§ 96–98 *e*;
May, Law of Crimes, §§ 165, 166;
Clark and Marshall, Criminal Law, §§ 423–425;
Clark, Criminal Law (Tiffany Ed.), §§ 150–152;
Kenney, Criminal Law, pp. 264–271;
1 Russell on Crimes, pp. 553–586;
Archbold, Criminal Procedure, pp. 1697–1709;
2 Bishop, Criminal Law, §§ 1143–1155, 1183–1186, 1256–1259;
Wharton, Criminal Law, §§ 395–400, 1535–1550, 1555;
McClain, Criminal Law, §§ 991–1005.

§ 497. Of Disturbing Meetings.

Disturbing a meeting is the wrongful interruption of persons who are assembled together for a lawful purpose. All per-

sons have a right to peaceably assemble for religious worship, for political discussion, or for any other purpose not in itself unlawful; and the invasion of this right by others is an indictable offence. The interruption must, however, be wilful and designed, and not the result of accident or mistake.

Rem. Of what acts a disturbance may consist depends upon the character and object of the meeting. To some assemblies noise and tumult are appropriate, and all persons are at liberty not only to be present, but to express their sentiments and feelings, in any manner suited to their tastes. Other assemblies are open to certain persons only, or their rules and customs restrict the right to take an active part in their proceedings to particular members. Judged by the standards thus established any wilful conduct which disturbs the meeting, and tends to defeat its purpose, constitutes this crime.

READ: Desty, Criminal Law, §§ 93–93 *b*;
Clark and Marshall, Criminal Law, § 426;
1 Russell on Crimes, pp. 652–658;
2 Bishop, Criminal Law, §§ 301–310 *a*;
Wharton, Criminal Law, §§ 1556, 1556 *a*;
McClain, Criminal Law, §§ 1022–1028.

§ 498. Of Forcible Entry and Detainer.

Forcible Entry is an entry upon land, which is in the peaceable possession of another, with such an array of force as to arouse terror in the minds of those who are present opposing the entry. The *premises entered upon* must be in the possession as distinguished from the bare custody of the holder, and the act of entry must be accompanied with such violence of conduct or language, or be effected by such an array of numbers, as to excite a reasonable apprehension in the minds of those who oppose it that bodily harm to themselves, or a breach of the public peace, will occur if they do not surrender their possession. But the violence may be offered to the person either upon the premises or at a distance therefrom, provided it is coupled with a claim to the possession of the land and with the design thereby to enforce such claim. *Forcible Detainer* is the detention of land from the rightful claimant by an intruder, or by a tenant whose estate has expired, by means of such force or intimidation as to excite terror in the mind of the claimant. This offence

is the converse of the preceding, and the same rules as to the nature and amount of the force displayed apply. A forcible entry or detainer by a person claiming no interest in the land is a still more aggravated form of the offence.

Rem. Under the early English law the rightful claimant of land, who had been disseised or turned out of possession, might regain possession by force unless his right had been legally barred. But by the Act of 5 Rich. II (A. D. 1382), and later statutes in this country, such forcible entries have been prohibited as breaches of the peace, and punished with severe penalties.

READ: 4 Bl. Com., pp. 148, 149;
Boone, Real Property, §§ 495–511;
Desty, Criminal Law, §§ 99–100 *a*;
May, Law of Crimes, §§ 167–170;
Clark and Marshall, Criminal Law, §§ 417, 418;
Clark, Criminal Law (Tiffany Ed.), §§ 154, 155;
Kenney, Criminal Law, p. 272;
1 Russell on Crimes, pp. 717–730;
Archbold, Criminal Procedure, pp. 1128–1137;
2 Bishop, Criminal Law, §§ 489–520 *a*;
Wharton, Criminal Law, §§ 1083–1113;
McClain, Criminal Law, §§ 836–841;
Maxwell, Pleading and Practice, §§ 563–569;
Bolles, Important English Statutes, p. 21. *Act 5 Rich. II.*

§ 499. Of Duelling: Challenging: Affrays.

Duelling is the agreement of two or more persons to fight with deadly weapons with intent to take life, and their actual fighting in pursuance of such agreement. When death results from a duel it is *murder* in the person killing; and all those who are present and give countenance to the duel are participators in the crime. *Challenging* is the exciting, inviting, or provoking of another to fight. The challenge may be oral or written, or may be conveyed by any signs which are intended to be understood, and by the other party are understood, to be an offer to fight. The bearer of a challenge to fight a duel, if the duel actually takes place and either party is killed, is an accessary before the fact to the homicide. *Abusive language*, not implying a present readiness to fight, is not a challenge; but like many other actions tending to provoke a conflict, and disturb the public peace, is frequently prohibited by statute. An *affray* is the unlawful fighting together of two or more per-

sons, in a public place, to the terror of the public. A *public place* is a place to which people in general are, at the time, privileged to resort without an invitation; and includes not merely the area open to the public but localities so contiguous thereto that acts of violence performed in them could be seen or heard therefrom, and thus disturb the public. A fight in a private place, though in the presence of others, is not an affray, but may be a criminal assault or a statutory crime.

Rem. *Fighting* consists of actions attempting or inflicting violence, not of mere verbal abuse. The *terror* suffered by the public may be actual, or may be presumed from the nature of the contest if this is calculated to excite it. An affray may be *aggravated* by the circumstances under which it is committed, — as if it be dangerous in its tendency or occur in a court of justice. To fight in self-defence does not make a party guilty of an affray.

READ: 4 Bl. Com., pp. 145, 146, 150, 199;
Hawley, Criminal Law, p. 269;
Desty, Criminal Law, §§ 94–95 *c*;
May, Law of Crimes, §§ 163, 164;
Clark and Marshall, Criminal Law, §§ 419–421;
Clark, Criminal Law (Tiffany Ed.), §§ 149, 153;
Kenney, Criminal Law, pp. 271, 272;
1 Russell on Crimes, pp. 587–594;
Archbold, Criminal Procedure, pp. 833–845, 1709–1713;
2 Bishop, Criminal Law, §§ 1–7, 311–317;
Bishop, Statutory Crimes, § 298;
Wharton, Criminal Law, §§ 1551–1554, 1767–1778;
McClain, Criminal Law, §§ 1006–1021.

§ 500. Of Criminal Libel.

A *libel* is the wilful and malicious publication, in a permanent and visible form, of some matter tending to disgrace or degrade another, or to render him ridiculous in the eyes of the community. It is a civil injury, and is also a crime. Its attributes as a crime are the same as in a private wrong, though its criminality consists rather in its consequences as endangering the public peace than in the injury it may inflict upon private reputation. When directed against public officers, or political institutions, it may become a crime against the sovereignty of the State itself.

Rem. The distinction between a *criminal libel* when considered as an attack upon private reputation, and the same libel in its aspect as endangering the public peace, is important in view of the defences which are open to the author of the libel upon his prosecution for the crime. No publication made with good motives, and for justifiable ends, is malicious; and therefore such a publication is not a libel, either criminal or civil. A libellous publication, if true, is not always an injury for which damages can be recovered, nor should it be regarded as a crime if its sole effect is to impair the reputation of the party libelled. But where it constitutes a substantial provocation to the party libelled to break the public peace its truth or falsehood is of little consequence, except perhaps in mitigation of the penalty, since in many cases the greater the truth of the publication the more likely it is to lead to acts of violence. This relation of the libel to the guilt of the libeller, under the doctrines of our modern constitutions and statutes which permit the truth of the libel to be shown by the libellee in his defence, has been thrown into some confusion by the application to one form of criminal libel, of rules logically applicable only to the other. It seems absurd to prosecute as a crime a mere injury to reputation for which the civil courts would offer no redress, and equally absurd to allow the public peace to be imperilled by a libel because the libel happens to be true. It would seem more reasonable for the State not to recognize a true libel as a crime unless it does endanger the public peace; and to punish libels, which are a menace to the social order, whether or not their subject-matter may be true.

READ: 4 Bl. Com., pp. 150–153;
Desty, Criminal Law, §§ 140–140 *l*;
May, Law of Crimes, §§ 172–176;
Clark and Marshall, Criminal Law, § 428;
Clark, Criminal Law (Tiffany Ed.), §§ 156, 157;
Kenney, Criminal Law, pp. 297–303;
1 Russell on Crimes, pp. 595–651;
Archbold, Criminal Procedure, pp. 1028–1067;
2 Bishop, Criminal Law, §§ 905–949;
Wharton, Criminal Law, §§ 313–318, 1594–1666 *a*;
McClain, Criminal Law, §§ 1040–1070.

§ 501. Of Carrying Arms.

A breach of the peace may be committed by *carrying dangerous or unusual weapons* in public places, openly and to the annoyance or the terror of the public. The Federal Constitution secures to every citizen the right to keep and bear such arms as are customarily employed for warlike purposes;

and to cultivate the military art of handling and using them in defence of the people and the State. This right does not extend to strange and unwonted weapons, nor to those unsuited for warlike purposes, nor to the carriage of any arms whatever in a tumultuous manner.

Rem. The public peace may also be endangered by the *secret carriage of deadly weapons*, both by stimulating their possessor to engage in conflicts from which he would otherwise refrain, and by misleading his antagonists into encounters which they would have avoided if his weapons had been openly displayed. On these grounds the possession of *concealed weapons* is often prohibited by statute, and punished as a crime.

READ: 4 Bl. Com., p. 149;
Desty, Criminal Law, §§ 92–92 *b*;
Clark and Marshall, Criminal Law, § 422;
Bishop, Statutory Crimes, §§ 781–801;
Wharton, Criminal Law, § 1557;
McClain, Criminal Law, §§ 1029–1039.

ARTICLE II

OF CRIMES AGAINST PUBLIC POLICY

§ 502. Of Public Nuisances.

Crimes against public policy are those by which the decency, morals, or convenience of the public are assailed. Many of these offences are classed under the head of Public Nuisances. A *public nuisance* is any action or omission which unlawfully annoys the public, and does not belong to any other class of crimes. Hence this name embraces many species of injuries to the public welfare which do not break the public peace, or interrupt the course of public trade, or impair the public health, or obstruct the administration of public justice, yet which public policy compels the State to endeavor to prevent by affixing penalties to their commission. Among them are the following: (1) Obstructing public highways or navigable waters; (2) The illicit sale of intoxicating liquors; (3) Keeping a public gaming-house; (4) Keeping a bawdy-house, or house of ill-fame; (5) Keeping a disorderly house, or house to which people resort to the disturbance of the neighborhood; (6) Public

drunkenness; (7) Public lewdness; (8) Wilful exposure of the person in a public place; (9) Immoral exhibitions; (10) Distribution of obscene books or pictures; (11) Eavesdropping; (12) Public scolding and vituperation; (13) Public idleness and vagrancy; (14) Violation of the Sunday Laws.

Rem. These various nuisances and others of the class are public only when committed in a public place, or when they affect three or more persons or families, and are in their nature calculated to injure all who come within the sphere of their influence. The same actions and omissions, when not public, are sometimes made penal offences by the law on account of their corrupting tendency in reference to individuals, and through them to the public. Such are many provisions of the liquor laws, the laws against gaming, and those forbidding other immoral practices.

READ: 4 Bl. Com., pp. 63–65, 167–175;
Hawley, Criminal Law, pp. 291–294;
Desty, Criminal Law, §§ 101–103 *c*, 105–112 *a*, 114–115 *b*, 117–117 *b*, 121–122 *d*;
May, Law of Crimes, §§ 171, 178–182;
Clark and Marshall, Criminal Law, §§ 427, 449–456, 457, 465–470, 472, 473;
Clark, Criminal Law (Tiffany Ed.), § 115;
Kenney, Criminal Law, pp. 308–312;
1 Russell on Crimes, pp. 731–879, 929–943;
Archbold, Criminal Procedure, pp. 1463–1466, 1751–1806;
1 Bishop, Criminal Law, §§ 495–508, 530–532 *a*, 1071–1151;
2 Bishop, Criminal Law, §§ 949 *a*–970, 1188–1190, 1264–1287;
Bishop, Statutory Crimes, §§ 844–1139;
Wharton, Criminal Law, §§ 1410–1532;
McClain, Criminal Law, §§ 1133–1145, 1156–1158, 1169–1326.

§ 503. Of Blasphemy and Profanity.

Blasphemy is any reproach, oral or written, wilfully cast upon the Deity, his name, attributes, or religion. Any words calculated and designed to impair or destroy the reverence, respect, and confidence due to God as the creator, governor, and judge of the world, — such as a denial of His being or providence, or any malicious scoffing at the Holy Scriptures exposing them to contempt and ridicule, or any other declarations which tend to subvert religion and piety, are blasphemy. *Profanity* consists in the use of words which import an imprecation of future

divine vengeance, whether or not the name of the Deity is actually employed.

Rem. Three distinct views are taken by different systems of law as to the nature of these crimes. According to *one view* they are offences against religion, and especially Christianity as a part of the law of the land; and therefore are punishable when uttered in the presence of any number of people, be they few or many, and with or without their consent. According to *another view* they are injurious to the public only when spoken or published to three or more persons, and in such a manner as to constitute a public nuisance. According to the *third view* if delivered solely to parties who consent to read or hear them, and do not tend to create a disturbance of the public peace, they are not crimes. These differences of view are traceable in the interpretations given by courts of the same State to the same prohibitory rule, at different periods of time.

READ: 4 Bl. Com., pp. 59, 60;
Desty, Criminal Law, §§ 116–116 *a*;
May, Law of Crimes, §§ 192–194;
Clark and Marshall, Criminal Law, §§ 457, 471;
2 Bishop, Criminal Law, §§ 73–84;
McClain, Criminal Law, §§ 1159, 1160.

§ 504. Of Bigamy.

Bigamy consists in the contracting of a new marriage during the continuance of a prior lawful marriage relation. The *prior marriage* relation must have been valid in law, or if voidable it must not have been avoided, and must not have been dissolved either by death or divorce. According to the laws of some States the *second marriage* must have been so contracted that it would have been valid had the prior marriage relation not been then subsisting; in other States the mere performance of the second marriage ceremony, whether or not the marriage relation could have been created by it, is sufficient. Again, in some States it is held that *cohabitation* under the second marriage must have taken place; in other States, it is regarded as unnecessary. A marriage otherwise bigamous is none the less so because the parties entered into it under a *bona fide mistake of law* as to their right to marry; but a mistake of fact as to the continuance of the former marriage relation, in cases where the death of the other party to it may have been lawfully pre-

sumed, — as from his or her seven years' absence unheard of, — rebuts, in some States, the criminal intent.

Rem. The guilt of bigamy attaches to *both parties* if they knew, or are by law presumed to know, of the existence of the prior marriage relation; but if the unmarried party is innocently ignorant thereof only the married party is responsible. Local statutes introduce various qualifications into this crime, and certain of them make the subsequent cohabitation of the parties at any time or place, under the color of the marriage, a separate offence.

READ: 4 Bl. Com., pp. 163–165;
Hawley, Criminal Law, pp. 270–276;
Desty, Criminal Law, §§ 89–89 *g*;
May, Law of Crimes, § 196;
Clark and Marshall, Criminal Law, §§ 458, 459;
Clark, Criminal Law (Tiffany Ed.), §§ 116, 117;
Kenney, Criminal Law, pp. 286–292;
1 Russell on Crimes, pp. 659–716;
Archbold, Criminal Procedure, pp. 1807–1817;
Bishop, Statutory Crimes, §§ 577–613;
Wharton, Criminal Law, §§ 1682–1715;
McClain, Criminal Law, §§ 1071–1085.

§ 505. Of Criminal Sexual Acts.

Sexual acts are either acts according to nature or acts contrary to nature. Sexual *acts according to nature* are regulated by law in the interest of social order, and to promote the primary object of sexual relations, which is the procreation and education of children. Sexual *acts contrary to nature* the law forbids as heinous offences against decency, and dangerous to the health of present and future generations. In the regulation of natural sexual acts the law conforms to the theories and instincts current in the State in reference to the proper relations between men and women. The principles recognized by modern civilization confine such acts to men and women of a certain maturity of development, and united together in a permanent sexual relation; and forbid, directly or indirectly, all sexual acts outside of such relation or between immature persons, and all acts which tend to defeat the procreative end for which such acts are by nature ordained. These principles find expression in numerous laws, written or unwritten, pro-

hibiting the various forms of the following crimes: (1) Adultery; (2) Fornication; (3) Incest; (4) Miscegenation; (5) Abortion. *Adultery* and *Fornication* consist in natural sexual intercourse between a man and woman who are not lawfully married to each other. The line of demarcation between these two crimes is differently drawn in different States. In some States adultery is the voluntary sexual intercourse of a married woman with any man who is not her husband; whether the man is guilty of adultery or fornication being determined by further provisions of the local law. In other States adultery is the voluntary sexual intercourse of any married person with any man or woman who is not his or her lawful wife or husband; the married person being guilty of adultery, and the unmarried person of fornication only. In still other States adultery is the unlawful sexual intercourse of any married person with any person of the opposite sex; the single as well as the married being held guilty of adultery. *Fornication*, in the different States, includes all cases of unlawful sexual intercourse which, under the local law, are not adultery. When fornication is committed between a mature male and a female whom the law regards as immature, and therefore incapable of giving legal consent to the act whatever be her real age, the crime is aggravated to a high degree, and frequently punished as a rape. *Incest* is voluntary sexual intercourse between a man and a woman who are related, and know themselves to be related, by blood or affinity within such degrees that their marriage to one another would be unlawful. The fact that they have been formally married to each other does not palliate their crime. *Miscegenation* is the voluntary sexual intercourse of a man and woman who, on account of their racial differences, are forbidden by the law to marry. In some States parties may commit this crime merely by entering into an apparent marriage relation. *Abortion* is the wilful destruction of a fœtus in the womb of its mother, or its premature expulsion from her womb, under circumstances which render the act unjustifiable in law. The law permits the destruction or premature expulsion of a fœtus when it is necessary in order to save the life of the mother. It also permits the premature expulsion when it affords the only hope of life for the child. An

abortion can be committed by the mother herself, or by some other person with or without her consent; and it is immaterial whether the mother is married or single, or whether the child is legitimate or illegitimate.

Rem. Sexual acts contrary to nature are: (1) Sexual intercourse of a man with another man *per anum;* (2) Sexual intercourse of a man with a woman *per anum;* (3) Sexual intercourse in any manner of a man or woman with a beast. To the first and second of these acts the name of "*sodomy*" was anciently applied, and this is still its technical meaning, though it is often employed to denote also the third. The term "*buggery*" is sometimes used in the same sense. *Bestiality* is a word expressing only the third. These crimes have also, at certain periods, been treated as felonies and punished with death.

READ: Hawley, Criminal Law, pp. 276–281, 286–291;
Desty, Criminal Law, §§ 56–60, 88–88 *c*, 90–90 *b*, 113–113 *b*;
May, Law of Crimes, §§ 195, 200–203;
Clark and Marshall, Criminal Law, §§ 289–292, 460–463;
Clark, Criminal Law (Tiffany Ed.), §§ 118–127, 129–131;
Kenney, Criminal Law, pp. 155, 156, 292–296;
3 Russell on Crimes, pp. 249–252;
Archbold, Criminal Procedure, pp. 951–982, 1015–1026, 1818–1828;
2 Bishop, Criminal Law, §§ 1191–1196;
Bishop, Statutory Crimes, §§ 653–780;
Wharton, Criminal Law, §§ 579, 580, 592–602, 1717–1754;
McClain, Criminal Law, §§ 1086–1099, 1120–1132, 1146–1155.

ARTICLE III

OF CRIMES AGAINST PUBLIC TRADE

§ 506. Of Cheating.

Cheating is the perpetration of a fraud by the false use of some token or symbol in which, according to the customs of society, the public are expected to place confidence. *Mere words,* whether spoken or written, however false they may be, do not amount to a cheat, for no one is obliged to accept the verbal statements of another. But false weights and measures, loaded dice, worthless bank-bills, forged notes or checks or conveyances, debased coin, adulterated commodities, and the like, when so employed as to deceive a person exercising common prudence and trusting to their genuineness and their conformity to the established standards, involve a breach of faith

toward the entire public in reference to matters on which they are compelled to rely; and which must, therefore, be protected against fraudulent abuse by penalties sufficiently severe.

Rem. *Public trade* is the general commercial intercourse of the citizens of the State with one another. Its preservation and prosperity depend upon their mutual confidence, and the maintenance of fair and unrestricted competition. For the convenient prosecution of commercial intercourse certain instrumentalities are necessary, — such as standards of weight, measure, and value, or specific names for commodities indicating their character and quality. In these the public voluntarily put faith, and unless this faith were justified trade would be impossible. To compel all persons to respect these instrumentalities the law forbids any abuse of them for purposes of fraud, and punishes it as the crime of cheating.

READ: 4 Bl. Com. pp. 157, 158;
Desty, Criminal Law, §§ 148–148 *g*;
May, Law of Crimes, §§ 318–320;
Clark and Marshall, Criminal Law, §§ 350–354;
Clark, Criminal Law (Tiffany Ed.), §§ 101, 102;
2 Bishop, Criminal Law, §§ 141–168;
Wharton, Criminal Law, §§ 1116–1129;
McClain, Criminal Law, §§ 660–664.

§ 507. Of Unlawful Interference with Competition in Trade.

Interference with *competition in trade* may prejudice two rights: (1) The right of individuals to enter into competition with others, in order to benefit by the profits to be derived from trade; (2) The right of the public to the advantages in quality and cheapness which competition may tend to secure. *Interference with competition* consists in any measure which debars others from embarking in commercial enterprises, or restricts the operations of those who are already engaged therein, in such a manner or to such an extent as may prevent the public from obtaining fair supplies at the lowest price. What interference is thus prejudicial is determined largely by current economic theories; and the prohibitions of the law concerning them consequently vary from one age to another. The following practices have from time to time been regarded as such interference, and have been forbidden and punished as crimes:

(1) *Monopolies*, or the exercise by royal license of the sole right to carry on a trade or sell a certain commodity; (2) *Forestalling, Regrating*, and *Engrossing*, which are different oppressive modes of acquiring control over the market, especially over the supply of provisions; (3) *Combinations to raise the price* of goods or labor.

Rem. In this country it has been the general policy of the law to allow competition to regulate itself, unless the interference with it has proceeded to such acts of violence or intimidation as to disturb the public peace, or seriously invade the right of personal liberty. The fact that merchant princes may become as dangerous despots as if their dominion were political rather than commercial, and that labor unions may be as formidable a menace to the safety and progress of the State as any treasonable conspiracy, has recently obtained some recognition and led to the enactment of laws against certain combinations, whether of person or property, which inflict or threaten injury to the commercial interests of the State. These laws, contained in Acts of Congress and the statutes of individual States, are as yet of narrow scope and of no great practical efficiency.

READ: 4 Bl. Com., pp. 154–157, 158–160;
Desty, Criminal Law, § 104;
May, Law of Crimes, § 177;
Clark and Marshall, Criminal Law, §§ 474–481;
1 Russell on Crimes, pp. 475, 476;
1 Bishop, Criminal Law, §§ 508 *a*–529;
Wharton, Criminal Law, §§ 1849–1851.

ARTICLE IV

OF CRIMES AGAINST PUBLIC HEALTH

§ 508. Of the Public Health.

Public health is a resultant from the health of the individuals of whom the public is composed, and hence whatever imperils the health of individuals endangers that of the public. Against injuries to health the law has always endeavored to protect private persons by giving them preventive and compensatory legal remedies, and authorizing them to suppress the cause of injury whenever they would not thereby disturb the public peace. It has also recognized as public wrongs those actions and omissions which might directly, and at the same time

impair the health of many individuals. But the more recent discovery that every diseased person may be a center of infection, from which morbific influences may radiate imperceptibly and unpreventably throughout entire communities, has given to the public health a wider aspect, and tended to identify it more closely with that of every individual. For this reason public health is now regarded as invaded by numerous acts which terminate on single persons, and only through their secondary consequences affect the public.

Rem. Injuries to public health were formerly classed among *public nuisances*, and only to those actions and omissions which corresponded with the definition of a public nuisance, as a wrong affecting several individuals at once, were their prohibitions and penalties applied. All such wrongs may still be prosecuted and punished as public nuisances, and therefore crimes under the unwritten law. The injuries which reach the public indirectly through their primary effect upon the individual are not public nuisances, as legally defined, and are ordinarily prohibited by written law.

READ: 1 Bishop, Criminal Law, §§ 489–494.

§ 509. Of Offences against Public Health.

Among the numerous actions and omissions punishable as *crimes against the public health* are these: (1) The pollution of waters likely to be used for drinking or domestic purposes; (2) The production of nauseating odors, offensive vapors, or alarming noises; (3) The sale or distribution of unwholesome provisions, drugs, and other articles; (4) The maintenance of dangerous pitfalls, explosives, machinery, or animals; (5) The exposure of other persons to a contagious disease; (6) The breach of quarantine regulations.

Rem. As the protection of public health is one of the most important duties of the administrative officers of the State, and often requires energetic and immediate action, the rules forbidding these and other similar offences are found not merely in statutes, but in municipal ordinances, the regulations established by local boards of health, and the orders issued from time to time by the heads of police departments; all of which have within the area of their jurisdiction the same force as the general statute law.

READ: 4 Bl. Com., pp. 161–162;
Desty, Criminal Law, §§ 118–120 *a*;
Clark and Marshall, Criminal Law, §§ 445–448;
1 Russell on Crimes, pp. 269–276;
Wharton, Criminal Law, §§ 1433–1441.

ARTICLE V

OF CRIMES AGAINST PUBLIC JUSTICE

§ 510. Of Official Negligence.

Crimes *against public justice* are those actions and omissions by which the course of legal proceedings is perverted, impeded, or prevented. Some of these crimes can be committed only by officers of the law to whom the administration of public justice is confided. Others may be perpetrated by the litigating parties; and still others by persons who have no legitimate interest in the proceedings. The principal crimes which *public officers* can commit in their official capacity are three: (1) Official Negligence; (2) Oppression; and (3) Extortion. *Official negligence* is the voluntary failure of a sheriff, coroner, or other minor civil officer, to discharge those public duties which are imposed upon him by the law. This failure may consist in the refusal to accept the office to which he has been elected or appointed, unless the law leaves him an option in the matter; or in the careless or fraudulent performance of the acts pertaining to his office; or in his neglect of some particular official duty. An officer *de facto*, equally with one *de jure*, may be guilty of this crime.

Rem. The criminal liability for official negligence does not depend upon its consequences to other persons, nor is it diminished by the fact that the officer was mistaken either as to the law or as to the circumstances in reference to which his action was required. But where the performance of the duty was practically impossible, or would have been attended with such a personal risk that men of ordinary courage and agility could not have been expected to incur it, its neglect is excusable. Legislators, judges of courts of record, and such *high officers of government* as are entrusted with important discretionary duties, are not chargeable with this crime; but when guilty of offences pertaining to their office, of which the law will take any notice whatever, are subject to impeachment or to proceedings for contempt.

READ: 4 Bl. Com., p. 140;
Desty, Criminal Law, §§ 82–83 *a*, 86–86 *a*;
2 Greenleaf, Evidence, §§ 580–599;
May, Law of Crimes, § 142 *a*;
Clark and Marshall, Criminal Law, § 434;
Clark, Criminal Law (Tiffany Ed.), §§ 145–147;
Kenney, Criminal Law, pp. 313, 314;
1 Russell on Crimes, §§ 416–422, 428, 429;
Archbold, Criminal Procedure, pp. 1364–1368;
2 Bishop, Criminal Law, §§ 971–982;
Wharton, Criminal Law, §§ 1563–1591;
McClain, Criminal Law, §§ 904–913.

§ 511. Of Oppression.

Oppression is the tyrannical partiality of a public officer in the administration of his office. Undue severity inflicted upon persons in their custody by jailers, constables, and other ministerial officers; the improper exercise of official authority over persons temporarily subjected to it, in order to compel them to do some act which but for the duress they never would have consented to perform; the refusal to discharge a duty from a motive of revenge, or except upon compliance with conditions which the officer had no right to impose, — are instances of the forms which this crime may assume.

Rem. To constitute this crime in a judicial officer the acts of partiality must be corrupt, and proceed from dishonest motives, as from fear or favor, and not from a mere error of judgment or mistake of law.

READ: 4 Bl. Com., p. 141;
May, Law of Crimes, § 142;
Clark and Marshall, Criminal Law, § 434;
Kenney, Criminal Law, pp. 313, 314;
1 Russell on Crimes, p. 416;
McClain, Criminal Law, §§ 914–919.

§ 512. Of Extortion.

Extortion is the corrupt demanding or taking by an officer, under color of his office, of any fee which is not due to him, or which exceeds what is lawfully due. The *thing extorted* must be taken as a *fee* pertaining to the office, — as by claiming a reward where the service is by law made gratuitous; or by demanding a greater amount than the law prescribes for the

service; or by refusing to perform the service until the fee is paid except in cases where the law entitles the officer to be paid in advance. The *motive* must also be corrupt; for where the reward is paid voluntarily for real benefits conferred by extraordinary exertions of the officer, or where the officer acts in good faith under a mistake, there is no extortion.

Rem. Any officer, whether a justice, sheriff, attorney, tax collector, or clerk of a court, and whether *de jure* or *de facto*, may be guilty of this crime. Extortion may be committed against the State, or a municipal corporation, as well as against a private individual.

READ: 4 Bl. Com., p. 141;
Desty, Criminal Law, §§ 84–85 *a*;
May, Law of Crimes, § 141;
Clark and Marshall, Criminal Law, § 434;
1 Russell on Crimes, pp. 423–428;
Archbold, Criminal Procedure, pp. 1368–1375;
2 Bishop, Criminal Law, §§ 390–408.

§ 513. Of Compounding Offences.

The principal crimes *against public justice* which can be committed by persons other than the officers of the law are: (1) Compounding Offences; (2) Falsifying Records; (3) Bribery; (4) Obstructing Process; (5) Escape; (6) Prison-Breach; (7) Rescue; (8) Misprision of Felony; (9) Receiving Stolen Goods; (10) Perjury; (11) Subornation of Perjury; (12) Embracery; (13) Barratry; (14) Maintenance; (15) Champerty. *Compounding* is the agreement of the injured party with the wrongdoer not to prosecute him for his crime, in consideration of some pecuniary advantage. The *pecuniary advantage* moving to the compounder may be a payment in money; or the restoration of stolen goods; or an official service having a pecuniary value; or any other matter from which the compounder could derive a substantial benefit. But *the intent* with which it is given and received must be the protection of the criminal from punishment, though whether this design be ultimately realized or not is of no consequence.

Rem. The gist of this offence is the concealment of the crime, and the screening of the criminal from prosecution, to the detriment of the public. Where the crime is a felony, or a misde-

meanor prejudicial to the public, compounding it is a concurrence in the public injury, and is properly prohibited. But where the offence attacks only private interests, and is of no great enormity, these settlements between the parties are now generally permitted.

READ: 4 Bl. Com., pp. 132–134, 136;
Hawley, Criminal Law, pp. 257, 258;
Desty, Criminal Law, §§ 10–10 *b*, 74 *d*;
Clark and Marshall, Criminal Law, § 438;
Clark, Criminal Law (Tiffany Ed.), § 141;
1 Russell on Crimes, pp. 411–415;
Archbold, Criminal Procedure, pp. 1852–1854;
1 Bishop, Criminal Law, §§ 709–715;
Wharton, Criminal Law, § 1559;
McClain, Criminal Law, §§ 938–940.

§ 514. Of Falsifying Records.

Falsifying records is the wilful and unauthorized removal, suppression, or alteration of any public record. The law gives the highest credit to its public official records, some of which import absolute verity and cannot be contradicted by any other evidence. The destruction or concealment of these records, or any alteration therein, not made under competent authority and for the purpose of properly correcting errors, is therefore treated as a crime of great magnitude, and formerly was punishable by death.

Item. By some authorities this crime is held to be a species of forgery, but in reality it differs therefrom in two particulars: (1) That no specific intent to defraud other persons is of the essence of this crime, as it is of the crime of forgery; and (2) That the record falsified need not import a legal obligation, as one which is the subject of forgery must do. At the same time it is true that many falsifications of public records would be offences of a dual aspect, and fall also within the definition of a forgery, — such as an alteration in a judgment record changing the obligations of the parties, or in the registration of a deed giving to one a color of title to land which was in truth the property of another.

READ: 4 Bl. Com., pp. 127, 128.

§ 515. Of Bribery.

Bribery is the giving or receiving of any valuable thing in order that the receiver may be corruptly influenced thereby

in the discharge of some public duty. This crime is committed equally by the giver and the receiver, provided both concur in the corrupt purpose of the gift; and is complete when the gift is offered and received, although official conduct may not be actually influenced thereby. The duties which it is designed to pervert need not be judicial duties, nor even those connected with a permanent office; the purchase of votes, or the procurement of a public appointment by means of an undue reward, falling within the definition of this crime.

Rem. The *offer* to give or to receive a bribe, although the offer is refused, is an attempt at bribery, but is of so dangerous a nature that it is constantly classed with and punished in the same manner as bribery itself.

READ: 4 Bl. Com., pp. 139, 140;
Hawley, Criminal Law, pp. 258–260;
Desty, Criminal Law, §§ 71–71 *c*;
May, Law of Crimes, § 140;
Clark and Marshall, Criminal Law, § 432;
Clark, Criminal Law (Tiffany Ed.), § 144;
Kenney, Criminal Law, pp. 312, 313;
1 Russell on Crimes, pp. 433–435, 443–461;
Archbold, Criminal Procedure, pp. 1663–1666;
2 Bishop, Criminal Law, §§ 84 *a*–89;
Wharton, Criminal Law, §§ 1857–1859;
McClain, Criminal Law, §§ 896–903.

§ 516. Of Obstructing Process.

Obstructing process consists in any act which is designed to and actually does prevent or hinder the complete performance of their duties by the officers of the law. Any person who is clothed with public authority for any purpose, and who is endeavoring to carry into effect by proper means the mandate of the law, is an officer within the meaning of this crime; and every person who voluntarily offers any obstruction either to the performance of his duty by such officer, or to the accomplishment of the purpose of the law through the discharge of that official duty, is guilty of the crime itself. Thus to hinder the service of a *subpœna* on a witness, and to deter a subpœnaed witness from attending court, are alike forms of this offence.

Rem. When the obstruction of process is accompanied by force it may become a breach of the peace. If the forcible ob-

struction causes the death of the officer it will be murder, provided his acts were wholly within his authority; manslaughter, if he exceeded or was without authority; and excusable homicide only if, without authority, he put the life of the resister into hazard and the killing consequently was in self-defence.

READ: 4 Bl. Com., p. 129;
Hawley, Criminal Law, pp. 263–266;
Desty, Criminal Law, §§ 76–76 *c*;
Clark, Criminal Law (Tiffany Ed.), § 135;
1 Russell on Crimes, pp. 880–883;
Archbold, Criminal Procedure, pp. 940–942;
2 Bishop, Criminal Law, §§ 1009–1013;
McClain, Criminal Law, §§ 920–929, 937.

§ 517. Of Escape: Prison-Breach: Rescue.

Escape is the wrongful release from custody of a person who is under lawful arrest and imprisonment. This crime may be committed by the prisoner himself, as where he voluntarily flees from legal custody; or by the officer or other person in whose custody he is, and who intentionally or negligently permits him to depart. The guilt or innocence of the prisoner is not material, nor does the acquiescence of the officer in whose custody he is affect his liability for his escape. *Prison-breach* is an aggravated escape. It consists in the forcible breaking out of a lawful place of imprisonment, by a person who is lawfully confined therein, and who by means of such breaking effects his escape therefrom. The structure in which the prisoner was confined must be actually broken by the prisoner himself, or by others through his procurement, and either for the purpose of the escape or by the force used in escaping. A prisoner who departs through an aperture made without his consent is guilty of a simple escape only, and not of prison-breach; while one who breaks without departing is guilty of neither offence. To break from prison through necessity — as if the building is on fire — is not a crime; but the filthiness or unsanitary condition of the prison creates no such necessity. *Rescue* is the act of other persons, liberating by force a prisoner who is known to them to be under lawful arrest or detention. All participants in a rescue become guilty of the same degree of crime as that with which the prisoner was charged.

Rem. A voluntary release by an officer of a prisoner charged with crime makes the officer a *party to the crime;* and if the crime is a felony the officer becomes an accessary after the fact, and therefore a felon also. A negligent release by an officer amounts only to a misdemeanor. An escape from unlawful arrest is not a crime, nor is the prisoner responsible for any force he may employ in accomplishing his release, unless it exceeds in quantity or degree that which was rendered necessary by the violence arrayed against him.

READ: 4 Bl. Com., pp. 129–132;
Hawley, Criminal Law, pp. 260–263;
Desty, Criminal Law, §§ 77–81;
May, Law of Crimes, §§ 159–162;
Clark and Marshall, Criminal Law, §§ 435–437;
Clark, Criminal Law (Tiffany Ed.), §§ 137–139;
Kenney, Criminal Law, pp. 314, 315;
1 Russell on Crimes, pp. 889–928;
Archbold, Criminal Procedure, pp. 1861–1872;
2 Bishop, Criminal Law, §§ 1064–1106;
Wharton, Criminal Law, §§ 1667–1680;
McClain, Criminal Law, §§ 930–936.

§ 518. Of Misprision of Felony: Receiving Stolen Goods.

Misprision of Felony is the neglect of any person, who knows that a felony has been or is about to be committed, to give such information to the proper authorities as may prevent the felony or bring the felon to justice. If such knowledge includes *open assent* and encouragement to a future felony, or its concealment aids in the escape of a person who is guilty of a felony already perpetrated, the offence is not a mere misprision but makes the offender an accessary.

Rem. Receiving stolen goods is one form of misprision which has been specially prohibited by law. It consists in the reception, from the thief himself, of goods which are known by the receiver to have been stolen by the person from whom he received them, for the purpose of aiding the thief by their concealment or by their secret conversion into other property. To receive stolen goods for purposes of gain to the receiver is a more aggravated crime. It involves an assent to the theft, and a voluntary participation in its results, and is therefore punished as a separate offence.

READ: 4 Bl. Com., pp. 121, 132, 133;
Hawley, Criminal Law, pp. 237–241;
Desty, Criminal Law, §§ 9, 147–147 *b*;

May, Law of Crimes, §§ 324–328;
Clark and Marshall, Criminal Law, §§ 380–387, 439;
Clark, Criminal Law (Tiffany Ed.), §§ 108, 109, 140;
Kenney, Criminal Law, pp. 237–239;
2 Bishop, Criminal Law, §§ 1137–1142 *a*;
Wharton, Criminal Law, §§ 249, 982–1009;
McClain, Criminal Law, §§ 713–719.

§ 519. Of Perjury: Subornation of Perjury.

Perjury is the wilful giving of false testimony under oath, before a competent tribunal upon a point material to the issue. Testimony is *wilfully false* when the person testifying deliberately misrepresents the matter as it lies in his own mind, — as when he testifies to what he knows is not true, or to what he does not know to be true, or to what he believes to be false. The essence of this crime is the *corrupt intention;* for one who states the fact as it really is, if he believes that in so doing he is stating falsehood, gives false testimony. But no statement, however untrue in fact, if made under a *bona fide mistake* is wilfully false, even when such mistake is the result of gross carelessness or temporary intoxication. Testimony is *given under oath* whenever the witness has been sworn or affirmed in legal form, and on a proper occasion, by an officer duly empowered to administer such oaths. A *competent tribunal* is one which by law has cognizance of judicial proceedings; and in some States includes all authorities by whom the truth of any issue involving temporal disadvantage may be investigated and decided. Testimony is upon a *point material to the issue* whenever it is calculated to influence the tribunal in its decision of the issue, whether such influence be direct or indirect. *Subornation of perjury* is the procuring of another person to commit perjury by inciting, instigating, or persuading him to forswear himself, followed by his actual commission of the perjury in consequence of such procurement.

Rem. Both perjury and subornation derive their enormity from the perversion of justice which must ensue, if such grave and solemn falsehoods in judicial proceedings were permitted to pass unpunished. False *oaths on private occasions* not connected with the administration of public justice, though the oaths may be required by law for various purposes, are not, strictly speak-

ing, perjury; but are often embraced by statute in that crime, and are always subject to some form of penalty.

READ: 4 Bl. Com., pp. 137–139;
Hawley, Criminal Law, pp. 245–251;
Desty, Criminal Law, §§ 75–75 *j*;
May, Law of Crimes, §§ 147–153 *a*;
Clark and Marshall, Criminal Law, §§ 430, 431;
Clark, Criminal Law (Tiffany Ed.), §§ 142, 143;
Kenney, Criminal Law, pp. 280–285;
1 Russell on Crimes, pp. 293–403;
Archbold, Criminal Procedure, pp. 1714–1751;
2 Bishop, Criminal Law, §§ 1014–1056, 1197–1199;
Wharton, Criminal Law, §§ 1244–1334;
McClain, Criminal Law, §§ 852–895.

§ 520. Of Embracery.

Embracery is the attempt to corruptly influence a jury in the rendition of their verdict. Any influence which is exerted by any person whether himself a juror or not, and either upon a single juror or upon the whole panel, by means of any promises, threats, persuasions, gifts, entreaties, or in any other way than by the evidence, the arguments of counsel, and other legitimate proceedings in open court, is a *corrupt influence*. The giving of a reward to a juror or jurors after verdict partakes of the same character.

Rem. This crime is complete though the attempt fails, as where no verdict is rendered by the jury, or their verdict is unaffected by the influence. Embracery, like bribery, is a crime both in the person who exerts the corrupt influence and in the juror who yields to its control.

READ: 4 Bl. Com., p. 140;
Desty, Criminal Law, § 72;
May, Law of Crimes, § 146;
Clark and Marshall, Criminal Law, § 433;
Clark, Criminal Law (Tiffany Ed.), § 136;
Kenney, Criminal Law, p. 314;
1 Russell on Crimes, pp. 486–488;
Archbold, Criminal Procedure, pp. 1666, 1667;
2 Bishop, Criminal Law, §§ 384–389;
McClain, Criminal Law, § 899.

§ 521. Of Barratry.

Barratry is the habitual moving or exciting of quarrels between other persons, whether at law or otherwise. The guilty

party may be an attorney or a magistrate fomenting controversies with a view to the fees to be gained thereby, or an unofficial person acting through a mere spirit of mischief or ill-will. But no man becomes a barrator by quarreling on his own account with other people, and plunging into litigation with them, unless he acts entirely without reason and for the manifest purpose of vexing and oppressing his antagonists.

Rem. This crime cannot be completed by a single act, or by a series of acts which together constitute but one transaction. At least three instances are necessary, but whether these are always sufficient to make the act habitual has been disputed. When an attorney becomes a common barrator, he is liable not merely to the ordinary penalties, but also to dismissal from the bar.

READ: 4 Bl. Com., p. 134;
Hawley, Criminal Law, p. 253;
Desty, Criminal Law, §§ 74–74 *a*;
May, Law of Crimes, § 143;
Clark and Marshall, Criminal Law, § 440;
Clark, Criminal Law (Tiffany Ed.), § 132;
1 Russell on Crimes, pp. 489–500;
Archbold, Criminal Procedure, pp. 1857–1859;
2 Bishop, Criminal Law, §§ 63–69.

§ 522. Of Maintenance.

Maintenance is the giving of aid to either party in a law-suit by a person who has no legitimate interest therein. Such aid may be afforded by the furnishing of money, the hiring of counsel, or by bringing to the party public countenance and support. The danger of oppression, through the accumulation of undue influence in favor of one side of the litigation and against the other, formerly caused these acts to be forbidden, though in themselves they may have contained no element of wrong; but many of them have now ceased to be criminal unless coupled with the intent, and having the probable effect, to pervert the course of justice.

Rem. The existence of certain relations between a litigating party and his supporters has always justified this assistance. Thus a father and son, a husband and wife, a master and servant, an attorney and client, a landlord and tenant may aid one another in their suits against third parties. And any person may,

from motives of charity, contribute to enable a poor person to assert his legal rights.

READ: 4 Bl. Com., pp. 134, 135;
Hawley, Criminal Law, pp. 251–253;
Desty, Criminal Law, § 74 *b*;
May, Law of Crimes, §§ 143–145;
Clark and Marshall, Criminal Law, § 441;
Clark, Criminal Law (Tiffany Ed.), § 133;
1 Russell on Crimes, pp. 477–485;
Archbold, Criminal Procedure, pp. 1859, 1860;
2 Bishop, Criminal Law, §§ 121–130;
Wharton, Criminal Law, § 1854.

§ 523. Of Champerty.

Champerty is the giving of aid to either party to a suit, under an agreement with such party that the proceeds of the suit, if any there be, should be divided between them. Thus the contract of an attorney to collect a claim by a suit at his own expense, and take a certain proportion of the amount collected as his recompense; or a bargain with a stranger to bear the cost of litigation in consideration of a percentage of the result, are in their nature champerty. But where such agreements are in the interest of justice, as affording an injured person the only opportunity to assert his rights, our modern law permits them unless they are made instruments of fraud or oppression.

Rem. The essential evil in this offence is its tendency to incite law-suits which the real parties in interest would not think it worth their while to commence; and in the danger of unfair proceedings in order to secure the profit of the speculator. Akin to champerty is the buying or selling of *pretended titles* to land, in order that the buyer may enforce the title at his own expense and for his own benefit. Such purchases were once generally forbidden; but in many States the law against them is relaxed.

READ: 4 Bl. Com., pp. 135, 136;
Hawley, Criminal Law, pp. 251–253;
Desty, Criminal Law, § 74 *c*;
May, Law of Crimes, § 143;
Clark and Marshall, Criminal Law, § 441;
Clark, Criminal Law (Tiffany Ed.), § 134;
Archbold, Criminal Procedure, p. 1861;
2 Bishop, Criminal Law, §§ 131–140;
Wharton, Criminal Law, § 1853.

SECTION III

OF CRIMES AGAINST THE PERSONS OF INDIVIDUALS

§ 524. Of Suicide.

Suicide is the unlawful and intentional destruction of one's own life. Although this act puts the person of the guilty party beyond the reach of human penalties, it is nevertheless regarded as a felony for the purpose of determining the liability of other persons who participate in or contribute to it, as well as of those who attempt it and fail in its commission. Thus one who *incites another* to commit suicide is guilty of murder if his advice is acted on in his presence, and death results, — as sometimes happens when two individuals agree to die together, and in carrying out their agreement one perishes, while the other one survives. An *attempt at suicide* is in itself a crime; and if in making it the offender kills another person, though unintentionally, he adds to the attempt the crime of murder. To kill another *at his own request* is also murder, unless the slayer is an innocent agent who, through want of capacity, mistake of fact, coercion, or other sufficient reason, is regarded as without the criminal intent.

Rem. Although the person of the suicide is no longer susceptible to human punishment, the law has always treated his crime with such horror and reprobation as its penalties were able to express. Strange and repulsive modes of burial, forfeiture of his estate, public opprobrium attached to his name and sometimes to his family, have been among the means employed to deter others from the commission of the crime; and while these penalties are no longer enforced, the law no less regards the act of the wilful suicide as a public wrong against the rights of the State to the life, the services, and the good example of the subject. The modern heresy that a man belongs to himself alone, and can do what he pleases with his own soul and body, finds no countenance in courts of justice, and no support in any principle of law.

READ: 4 Bl. Com., pp. 189, 190;
Hawley, Criminal Law, p. 144;
May, Law of Crimes, § 219;
Clark and Marshall, Criminal Law, § 250;
Clark, Criminal Law (Tiffany Ed.), § 70;
Kenney, Criminal Law, pp. 103–106;
3 Russell on Crimes, pp. 8–10;
2 Bishop, Criminal Law, § 1187;
Wharton, Criminal Law, §§ 448–454.

§ 525. Of Murder: the Person Killing.

Murder is the unlawful killing of another with malice aforethought. An ancient definition, which is frequently taken as a basis for the discussion of this crime, describes it as committed whenever a person of sound memory and discretion unlawfully kills a reasonable creature, in being and in the peace, with malice aforethought express or implied. This definition presents *six points* for consideration: (1) The person killing; (2) The person killed; (3) The act of killing; (4) The intent to kill; (5) The unlawfulness of the killing; (6) The malice aforethought. The *person killing* must be of sound memory and discretion; that is, he must be able to comprehend the nature of his act, and to refrain from doing it; and he must also be over seven years of age and, if under fourteen, must be proved to be capable of criminal intent. Temporary insanity existing at the moment of the homicide, and then sufficient to prevent the slayer from knowing or understanding the character and consequences of his conduct or to deprive him of self-control, also excludes him from this definition.

Rem. Voluntary intoxication caused by liquors, drugs, and other kindred substances, even when reducing its victim to an irrational or imbecile condition, does not render the slayer irresponsible, or change the nature of his criminal act though it may show that deliberation and premeditation were impossible. This is an arbitrary rule of public policy, not perhaps psychologically and morally justifiable, but considered necessary to the administration of the law and the protection of the public. Permanent insanity, caused by habitual intemperance, is true insanity, and like other forms of mental disease may be severe enough to make its subject incapable of crime.

READ: 4 Bl. Com., pp. 194, 195;
Clark and Marshall, Criminal Law, § 233;
Clark, Criminal Law (Tiffany Ed.), §§ 61, 62, 70;
Kenney, Criminal Law, pp. 115, 116;
3 Russell on Crimes, p. 5;
Wharton, Criminal Law, §§ 302, 303.

§ 526. Of Murder: the Person Killed.

The *person killed* must be a reasonable creature, in being and in the peace. A *reasonable creature* is a human being as distinguished from an irrational animal, and from any abnormal

product of the human species which, though born of woman, is destitute of intelligence and of the essential characteristics of the human body. A reasonable creature is *in being* when alive and fully born. A reasonable creature is *in the peace* whenever he is not a rebel, or a public enemy engaged in actual battle.

Rem. An infant in the womb of its mother is not a subject of homicide, nor does it become such when delivered until its connection with the mother is so far severed that, through the operation of its own heart and lungs, its independent life has actually begun. But when an infant, before birth, receives an injury from which it dies after being fully born alive, its death is that of a reasonable creature in being; and if the other elements of the crime are present the person inflicting the injury will be guilty of murder.

READ: 4 Bl. Com., p. 198;
Hawley, Criminal Law, pp. 119, 120;
Desty, Criminal Law, §§ 129–129 *a*;
May, Law of Crimes, § 219;
Clark and Marshall, Criminal Law, § 234;
Kenney, Criminal Law, pp. 119–122;
3 Russell on Crimes, pp. 5–8;
Archbold, Criminal Procedure, pp. 732–740;
2 Bishop, Criminal Law, §§ 630–634;
Wharton, Criminal Law, §§ 309, 310, 445–447;
McClain, Criminal Law, §§ 294, 295.

§ 527. Of Murder: the Act of Killing.

The *act of killing* is an external action or omission of the person killing, directly or indirectly producing upon the body of the person killed some physical effect, in consequence of which he dies within a year and a day after the action or omission has occurred. Death is, in contemplation of law, an event predicable of the body only, and hence must be occasioned by influences which inflict *corporeal* injury. But the causal relation between these influences and the death need not be immediate. If the external action or omission sets in motion a series of natural secondary causes which terminate in corporeal consequences culminating in death, the killing is attributable to the action or omission without which it would not have occurred. To guard against the uncertainties attending the attempt to trace these causal relations beyond narrow limits, the law conclusively pre-

sumes a death to have been natural unless it takes place *within a year and a day* after the action or omission to which, if homicidal, it would be attributed. In the computation of this period the day on which the action or omission happened is reckoned as the first.

Rem. Instances in which the *causal relation* between the criminal action or omission and the death has been decided to exist are the following: (1) To coerce or deceive another into taking poison, though the taking be his own act; (2) To induce another then and there to commit suicide; (3) To frighten another into conduct immediately destructive to his life; (4) To neglect a legal duty toward a sick or dependent person who perishes because of the neglect; (5) To permit dangerous animals to go at large at the risk of inflicting upon other persons a fatal injury; (6) To expose another to the contagion of a deadly pestilence; (7) To inflict a wound which through ordinary medical treatment becomes the cause of death. Such causes as these, and numberless other actions and omissions which of themselves produce no mortal injury yet are the sources from which through intermediate causes death results, are *acts of killing*, and render the actor guilty of the crime which the death completes.

READ: 4 Bl. Com., pp. 196, 197;
Hawley, Criminal Law, pp. 120–122;
Desty, Criminal Law, §§ 122–124 *f*;
May, Law of Crimes, § 230;
Clark and Marshall, Criminal Law, §§ 235–238;
Kenney, Criminal Law, pp. 116–119, 129–130;
3 Russell on Crimes, pp. 10–38;
Archbold, Criminal Procedure, pp. 642–653, 727–732, 846–863;
2 Bishop, Criminal Law, §§ 635–641;
Wharton, Criminal Law, §§ 152–169, 312;
McClain, Criminal Law, §§ 282–293.

§ 528. Of Murder: the Intent to Kill.

Every human action or omission for which the actor can be held legally or morally responsible, must be the expression of an actual or presumed intention, not only to perform the act but to produce its consequences. Hence every voluntary action or omission, which indirectly or directly causes death, is in the eye of the law the manifestation of an *intent to kill*. The doctrine that every person must be presumed to have foreseen and intended all the natural and probable consequences of his voluntary acts is here applied to its fullest extent; and whenever any

course of conduct, active or passive, might under ordinary circumstances result in the death of another person, any one who voluntarily enters on that course of conduct is held to have intended the death which it produces. Thus one who, from any motive whatever, neglects a legal duty whereby he evidently puts at hazard the lives of others; or who performs an act which through a series of secondary causes, not depending on extraordinary and unforeseeable conditions, produces death, — not only is guilty of the act of killing but also of the intent to kill. Where the line of demarcation between the ordinary and the extraordinary consequences of a course of conduct lies, in any given case, must be gathered from the circumstances of the case and from the general experience of mankind, and is not always easy to define. It is the line, which, in the law, separates accident from causal relation; and it is properly and wisely drawn by the law where it will impose upon the actor the largest measure of responsibility which can justly be imputed to him. Instances where this rule has been applied are found in cases involving the reckless propulsion of vehicles in public places; in the use of deadly weapons; in assaults with clubs or missiles; in attempts to stupefy with drugs; in the exhibition of firearms in order to frighten bystanders; in shooting at others in sport; in chastising delinquents with undue severity; in the setting loose of dangerous animals; in carelessness of medical treatment, — from any one of which, if death results, an intent to kill is presumed because death is its probable though not inevitable consequence. For the same reason, where the person killing attempted to take the life of a particular individual, and by chance the blow killed another, it is assumed that he intended to kill the one whose death he has thus undesignedly produced.

Rem. This presumed intent to kill must be *carefully distinguished* from malice and malice aforethought, which are actual conditions of the mind and will, and are predicable only of unlawful killing; while the imputed intent to kill exists in reference to every homicide, whether lawful or unlawful, except that which results from accident alone. Moreover, this intent must not be confounded with deliberation or premeditation, which are also actual states of mind and may or may not accompany the presumed intent to kill.

READ: Clark and Marshall, Criminal Law, §§ 241–245.

§ 529. Of Murder: the Unlawfulness of the Killing.

The act of *killing is unlawful* in every case where it is not expressly justified or excused by law. *Justifiable homicide* is an act of killing in pursuance of a legal duty. *Excusable homicide* is an act of killing not in pursuance of a legal duty, but under circumstances which so far palliate the killing that the law deems it wiser, in the interest of the public, not to visit it with punishment. The principal *instances of justifiable homicide* are four: (1) Where a public officer takes life in suppressing a riot, or in obedience to a legal warrant of execution commanding him so to do; (2) Where a felony has been committed, and the officers or private persons who are lawfully engaged in endeavoring to arrest the guilty party are unable to capture him without killing him, and so in good faith take his life in order to accomplish his arrest; (3) Where a public officer is commanded by a lawful warrant to arrest a designated person as a felon, and necessarily kills him in effecting his arrest; (4) Where a felony attended with extreme force or great atrocity is actually being attempted against the person, habitation, or property of an individual or of some one whom he is under a legal obligation to defend, and no other means of preventing the felony being available to him he kills the felon. In this fourth form of justifiable homicide all cases of true *self-defence* are embraced, as well as all cases in which the slayer owes to the public the general duty to suppress attempted felonies.

Rem. The cases of *excusable homicide* can never be exactly and permanently classified, since the policy which recognizes the excuse varies with the state of public feeling or conviction. Among those which have hitherto been thus regarded are the following: (1) Where a person doing a lawful act with reasonable care, and without intending bodily harm to any one, causes the death of another; (2) Where a public officer, lawfully attempting to arrest a person who is charged with a misdemeanor, meets with forcible resistance, and in endeavoring to overcome it kills his adversary; (3) Where a person, resisting an illegal arrest by lawful means, unintentionally or necessarily takes the life of his assailant; (4) Where a person who, without the intention to inflict serious bodily harm, engages in a sudden combat with another, and finding himself sore pressed and his life in danger retreats as far as he safely can, and then kills his adversary in his own necessary defence; (5) Where a person, without

the intention to inflict serious bodily harm, voluntarily provokes a sudden combat with another, and after the combat has commenced openly declines a further conflict, and by words or signs clearly conveys to his antagonist his desire for peace, but subsequently being driven to the wall has no alternative except to sacrifice the life of his opponent or to lose his own, and in this emergency kills his adversary; (6) Where a person who is assaulted by another under circumstances which create in his mind a reasonable though erroneous belief that the assailant intends to take his life or inflict upon him serious bodily harm, and that this intention is likely to be accomplished, flees as far as he can and then, seeing no other way of escape, kills his assailant. These cases illustrate the attitude of the courts and legislatures toward this form of homicide, while oftentimes the practical immunity accorded to the slayer goes far beyond the limits fixed by the current letter of the law, — as where officers of the law remain inactive when the penalty of death is inflicted on some atrocious offender by an aroused community, without judge or jury; or where juries refuse to convict fathers, husbands, or brothers who have avenged the dishonor of their sisters, wives, and daughters in the blood of their seducers.

READ: 1 Bl. Com., pp. 339–349;
4 Bl. Com., pp. 177–188;
Hawley, Criminal Law, pp. 122–137;
Desty, Criminal Law, §§ 125–127 *c*;
May, Law of Crimes, §§ 218, 231–239;
Clark and Marshall, Criminal Law, §§ 268–288;
Clark, Criminal Law (Tiffany Ed.), §§ 63–66, 68, 69;
Kenney, Criminal Law, pp. 94–102;
3 Russell on Crimes, pp. 205–217;
Archbold, Criminal Procedure, pp. 653–697;
2 Bishop, Criminal Law, §§ 613–622;
Wharton, Criminal Law, §§ 306–308, 401–444;
McClain, Criminal Law, §§ 296–300;
Rice, Criminal Evidence, §§ 357–370;
Vickers, Police Officers and Coroners, pp. 165–243;
Perley, Mortuary Law, pp. 11–19;
Smith, Coroners and Constables, pp. 21–45;
McMahon, Coroners, pp. 1–347.

§ 530. Of Murder: the Malice Aforethought.

Malice aforethought is a certain condition of the mind and will of the person killing, which exists both before and at the time of the killing, and under the influence of which the killing is performed. This condition is characteristic of the crime of *murder*, and differentiates it from every other form of homicide. It is

not identical with the intent to kill, for this intent is presumed in every voluntary killing whether lawful or unlawful, while malice aforethought is an actual condition of mind and will which is not presumed but must be definitely proved. *Malice*, as used in this phrase, signifies a malignant purpose; the impulse of a mind indifferent to the obligations imposed by reason, justice, and the law. Hence malice aforethought is a *deliberate malignant purpose;* a premeditated evil design; a mental and moral operation which is not expressed by such definitions as "a formed design to take life," or "a deliberate intention to kill," or "a premeditated killing," and other equivalent descriptions, since these lack the *essential element of malignancy*, and might be predicated as well of justifiable or excusable homicide. It has been more perfectly defined as "a deliberate purpose, formed in cool blood, to perpetrate an unlawful act which is likely to result in serious bodily harm"; or negatively as "that state of mind and will in which one person voluntarily and unlawfully kills another, otherwise than in heat of blood engendered by a sudden combat or by a provocation which the law does not expect frail human nature to withstand." Malice aforethought thus implies a mind and will sufficiently composed to be able to form a deliberate purpose, — that is, to apprehend and reason upon premises and to draw conclusions; and a wicked and evil disposition regardless of human rights and social duty. An unlawful homicide lacking either of these ingredients is manslaughter, and not murder.

Rem. When malice aforethought is manifested in unequivocal words or actions, such as deliberate threats, concerted plans or lying in wait to kill; the careful selection and use of deadly weapons; reckless attacks upon indefinite groups of people; attempts to commit robbery, arson, rape, or other previously contrived crimes dangerous to human life,—it is called *express malice.* When it is inferred from the deliberate commission of unlawful acts not immediately related to the death in which they happen to result, — such as forcible resistance to an officer; the administration of an anæsthetic to prevent opposition to an intended crime; or the killing in hot blood engendered by an insufficient provocation,— it is called implied malice. These terms indicate no difference in the species of malice aforethought though they may in its degree; but rather show the character of

the evidence by which it may be proved. The burden of proving that a homicide was committed with malice aforethought rests logically and legally upon the State, in every prosecution for this crime. But as the defendant is in a better situation to understand and explain his motives at the time of killing than the State can be, the rules of evidence require him to raise the issue and present the proof upon this subject when the State has shown that he performed the act of killing.

READ: 4 Bl. Com., pp. 198–201;
Hawley, Criminal Law, pp. 137–140, 143, 144;
Desty, Criminal Law, §§ 129 *b*–129 *h*;
May, Law of Crimes, §§ 220–224;
Clark and Marshall, Criminal Law, §§ 239, 240, 246–249;
Clark, Criminal Law (Tiffany Ed.), §§ 71, 72;
Kenney, Criminal Law, pp. 122–129;
3 Russell on Crimes, pp. 1–4, 70–129;
Archbold, Criminal Procedure, pp. 740–775;
2 Bishop, Criminal Law, §§ 623–629, 642–693;
McClain, Criminal Law, §§ 317–334, 358–368.

§ 531. Of Murder: the Degrees of Murder.

Malice aforethought is evidently a *matter of degrees*. Between the condition of one who calmly plans and executes the murder of an innocent and unsuspecting victim, and that of one who, hot with wrath and indignation from an injury which the law forbids him to resent with violence, strikes his tormentor a fatal blow, there is a wide field occupied by many gradations of mental composure, intensity of emotion, wrongful motive, evil disposition, and moral responsibility. When all forms of murder were punished with death it was of slight importance whether the culprit was animated by one extreme of malice or the other. But with a more humane instinct our modern law has attempted to discriminate between these conditions by dividing murder into different degrees, and imposing only on the most flagrant the penalty of death. The local legislation of our different States is not uniform upon this point; some recognizing two degrees of murder only, the first and second; others distributing the crime into more numerous grades. Under these laws the highest degree is usually characterized by deliberate premeditation, or by express malice, or by both combined.

Rem. When the standards fixed for these degrees of murder are adhered to only the most heinous forms of homicide receive

capital punishment. But when the protection they were intended to afford to the accused is frittered away by ambiguous instructions to the jury, as so frequently occurs, the distinctions between the different degrees of murder, and even those between murder and manslaughter, are lost sight of; and persons are convicted and executed for the highest crime when they were manifestly guilty only of the lower. Upon the question of deliberation and premeditation the mental incapacity of the accused, even though produced by voluntary intoxication, may be shown in his defence.

READ: Hawley, Criminal Law, pp. 141–143;
Desty, Criminal Law, §§ 129, 129 *q*;
May, Law of Crimes, § 225;
Clark and Marshall, Criminal Law, §§ 251–254;
Clark, Criminal Law (Tiffany Ed.), § 72;
2 Bishop, Criminal Law, §§ 723–731;
Wharton, Criminal Law, §§ 375–394;
McClain, Criminal Law, §§ 352–368.

§ 532. Of Manslaughter.

Manslaughter is the unlawful killing of another without malice aforethought. It embraces all forms of unlawful killing except murder, and contains the same ingredients and is governed by the same rules as murder in reference to the person killing, the person killed, the act of killing, the intent to kill, and the unlawfulness of the killing, — its sole difference being in the absence of that malignant purpose called malice aforethought. It is divided by the law into *two species*, according to the mental relation of the slayer to the act of killing, namely, (1) Involuntary Manslaughter; and (2) Voluntary Manslaughter.

Rem. The absence of malice aforethought from the act of killing may consist either in the entire absence of any purpose to take life, or in the presence of a purpose to kill which, though unlawful, is not deliberate and malignant. In the former case the death of the victim is not the desired or expected result of the unlawful act, and though the *act* may be voluntary its consequence, the *killing*, is involuntary. In the latter case the killing is voluntary, but the mind of the slayer is not, at the time, in that condition of composure which makes his act of killing the expression of a premeditated evil design. Hence the distinction between voluntary and involuntary manslaughter resides not in the act, but in the mental attitude of the actor toward the act and its result at the time the act of killing was performed.

READ: Desty, Criminal Law, §§ 128–128 *a*;
Clark and Marshall, Criminal Law, §§ 255, 258;
Clark, Criminal Law (Tiffany Ed.), §§ 73, 74;
3 Russell on Crimes, pp. 129–145, 171–202;
Archbold, Criminal Procedure, pp. 698–700;
2 Bishop, Criminal Law, §§ 694–721, 732–741;
Wharton, Criminal Law, §§ 304, 305, 319–374;
McClain, Criminal Law, §§ 335, 336.

§ 533. Of Involuntary Manslaughter.

Involuntary manslaughter is an unlawful killing through the voluntary performance of some wrongful act, or through the culpable omission of some legal duty, which at the time was not expected, and could not reasonably have been expected, to result in death. Thus when death is caused by a tort or crime which was not calculated, either from its own nature or the surrounding circumstances, to produce serious bodily harm the killing is involuntary manslaughter, unless the wrongful act were one of those felonies from whose commission malice aforethought is inferred by law. Again, when death follows as an extraordinary consequence from the wrongful neglect of a legal duty which has no manifest immediate relation to the personal security of others, or from the careless performance of a lawful act, it is also involuntary and the crime is manslaughter.

Rem. Where, however, the legal duty is one on whose proper performance human safety evidently depends its voluntary omission is *gross and wanton negligence*, from which implied malice may be inferred, and so raise the crime to murder.

READ: 4 Bl. Com., pp. 192–194;
Hawley, Criminal Law, pp. 148–153;
Desty, Criminal Law, § 128 *c*;
Clark and Marshall, Criminal Law, §§ 262–267;
Clark, Criminal Law (Tiffany Ed.), § 76;
Kenney, Criminal Law, pp. 110–115;
McClain, Criminal Law, §§ 347–351.

§ 534. Of Voluntary Manslaughter.

Voluntary manslaughter is the voluntary and unlawful killing of another while the mind of the slayer is in a condition which excludes the presence of a deliberate malignant purpose to take life. This condition the law recognizes as existing in *two cases:*

(1) Where the killing takes place in a sudden combat while the slayer is in hot blood; (2) Where the killing is committed in a sudden passion generated by an immediate provocation which the law regards as sufficient to transiently disturb the mind and destroy self-control.

Rem. A voluntary and unlawful killing by a person whose intellect is clear, and whose will is free from controlling impulses, is both deliberate and malignant, since the nature and unlawfulness of the act are fully understood, and the will dictates its performance in conscious defiance of divine and human laws. Hence it is only when the intellect is clouded, and the will constrained, by causes concurrent with the killing, yet in a degree not amounting to insanity, that the homicidal act can be voluntary, and still not the expression of a premeditated evil design. The field of human experiences which lies between knowledge and self-control on one hand, and insanity and irresponsibility on the other, is very wide and contains numerous degrees and variations. The law in grouping these experiences in two forms, according to the circumstances in which they may generally be expected to arise, has not intended to ignore the fact that hot blood *is* hot blood whether caused by sudden combat, or by sufficient provocation, or by any other circumstance which does actually engender it; and that hot blood *does* destroy that equilibrium of mind and that complete self-control without which malice aforethought is impossible.

READ: 4 Bl. Com., pp. 191, 192;
Hawley, Criminal Law, pp. 146–148;
Desty, Criminal Law, §§ 128 *b*, 128 *d*, 128 *e*;
Clark and Marshall, Criminal Law, §§ 256, 257, 259;
Clark, Criminal Law (Tiffany Ed.), § 75;
Kenney, Criminal Law, pp. 106, 107;
McClain, Criminal Law, § 343.

§ 535. Of Voluntary Manslaughter: Sudden Combat.

A *sudden combat* is one which arises without premeditated plan or purpose on the part of the slayer, and which so far as he is concerned is conducted openly and upon equal terms, without taking an unfair advantage of his adversary. That the fatal blow was given in a sudden combat does not, however, reduce the homicide from murder to manslaughter, unless the slayer was, *at the time* the blow was given, bereft of mental composure and complete self-control by the hot blood engendered

by the combat; and this is a question of fact to be decided by the jury in view of the natural inflammability of the slayer's disposition and the excitement to which he had been subjected. Moreover, the killing must have taken place, not only after the generation of hot blood, but before the blood had so far cooled that reason and freewill have resumed their sway. This also is a question of fact, to be determined partly in view of the lapse of time, and partly in view of other circumstances indicating a sufficient restoration of composure and self-command to render the slayer fully responsible for his own conduct. A common and reasonable test of this is whether, after the interruption of the combat and before the killing, the attention of the slayer had been diverted to a different occupation requiring some deliberation. Should this occur, and should the slayer on resuming the combat kill his adversary without a new enkindling of the blood, his act would be regarded as deliberate and his crime as murder.

Rem. A combat may be *sudden*, though the parties to it have been ancient enemies, and may have anticipated its occurrence as probable, and have prepared themselves to meet the emergency; provided its actual occurrence was by chance, and the slayer did not provoke it for a malicious purpose nor employ it as an opportunity for the gratification of his revenge. Even the use of deadly weapons, unless they were procured beforehand to be used on this occasion, or were concealed from the antagonist, or were treacherously handled, does not show that the combat in question was premeditated, or that the killing was deliberate.

READ: Desty, Criminal Law, § 128 *f*;
Kenney, Criminal Law, pp. 109, 110;
3 Russell on Crimes, pp. 57–70;
Archbold, Criminal Procedure, pp. 714–726;
Wharton, Criminal Law, §§ 471–483;
McClain, Criminal Law, § 339.

§ 536. Of Voluntary Manslaughter: Sufficient Provocation.

Hot blood engendered by *sufficient provocation* is also recognized by law as capable of producing such disturbance in the mind that one who, under its influence, unlawfully and voluntarily kills another may still be free from malice aforethought. The questions of the existence of hot blood, and of its effect upon the intellect and will of the slayer, are questions of fact to be settled,

as in the case of sudden combat, in view of the natural susceptibilities of the slayer and the degree of provocation to which he was subjected. Between the hot blood and its provocation the *causal relation* must be immediate and direct. One who voluntarily broods over a real or fancied wrong, until he stimulates himself into a state of ungovernable passion, is responsible both for the passion and its consequences. But a wrong does not become a provocation until it comes to the knowledge of the person wronged, and resentment then excited is immediate and direct, although the event to which it must be attributed as its cause long since occurred.

Rem. To guard against homicidal acts by persons who make no effort to properly control their passions, the law has sometimes attempted to place some limits to the *kinds of provocation* which it will recognize as sufficient. Thus it has been held that mere words can never be a sufficient provocation; nor any trespass to land or other property; nor any past or now intended adultery with the slayer's wife; nor the seduction of his sister. On the other hand, it has been decided that words leading to a combat, or the detection of an adulterer in the act of adultery, or a present forcible attack upon a wife or daughter, may be sufficient. Obviously it is not within the power or the province of the law to fix an inflexible standard by which the effect of certain influences upon human susceptibilities is to be determined. In reference to this matter every case must be judged by itself, avoiding alike the evil of accepting frivolous excuses for wanton acts, and the perhaps worse mistake of finding the slayer guilty of deliberate malice because, under the same circumstances, other men think they would retain their self-control. Upon this question modern authorities are more likely to be correct than are the older cases; especially where the courts, instead of adopting blindly the ancient *dicta*, apply to them the qualifications which our more intimate knowledge of the operations of the human mind compel us to observe.

READ: Hawley, Criminal Law, pp. 144–146;
Desty, Criminal Law, §§ 128 *g*–128 *l*;
May, Law of Crimes, §§ 226–229;
Clark and Marshall, Criminal Law, §§ 260, 261;
Clark, Criminal Law (Tiffany Ed.), § 42;
Kenney, Criminal Law, pp. 107–109;
3 Russell on Crimes, pp. 38–57;
Archbold, Criminal Procedure, pp. 700–714;
Wharton, Criminal Law, §§ 455–470;
McClain, Criminal Law, §§ 337, 338, 340–342, 344–346.

§ 537. Of the Ultimate Criterion of the Criminality of the Act of Killing.

The act of killing is that *precise action or omission* from which, as an effect from its cause, the death directly or indirectly results. The criminality of the act depends upon its unlawfulness *at the instant* when it was committed; and, if unlawful, the degree of its criminality is determined by the state of mind and will with which it was then performed. A homicidal act is usually one of a series of events which, taken together, constitute a single transaction; and if the act of killing were interpreted by the character of the transaction as a whole, its real nature might be frequently obscured. Hence it is always necessary that the whole transaction should be carefully analyzed; the homicidal element be separated from all its non-essential circumstances; and it be thus ascertained whether at the precise moment when it was performed the act was justifiable, excusable, or unlawful; and, if unlawful, whether it was then and there prompted by malice aforethought, or by heat of blood, or consisted in a tort or an unaggravated crime, or in a culpable omission. The failure to make this exact analysis, and the tendency of the courts to regard the surrounding circumstances of the act as determining its criminality, instead of as mere indications of that state of mind and will by which criminality is really to be measured, have led to many perversions of justice both in favor of and against the accused.

Rem. Thus, for example, the act of killing in a sudden combat may take place from the passion engendered in the conflict, or from a preconceived malicious purpose, or in necessary self-defence occasioned by the persistence of the adversary after the slayer had openly declined a further warfare and had been driven to the wall. So one who lies in wait to kill another, if he is surprised and attacked by his enemy before he has an apportunity to offer violence to him, and meets the attack with adequate violence leading to a combat in which he takes the life of his antagonist, may have slain him in self-defence, or in the heat of blood, or from the malice which he entertained before the conflict and which may have continued until the homicidal act was performed. Until the complex details of which such transactions are composed are sifted out, and apprehended in their proper relations to the criminal act itself, the character of that act cannot be understood, nor the fact and measure of its criminality be determined.

§ 538. Of the Corpus Delicti.

An important rule in cases of homicide, adopted for the protection of the accused, provides that he shall not be convicted of the crime except upon his own confession made in open court, unless the *corpus delicti* be clearly proved. The *corpus delicti*, or body of the crime, embraces that portion of the facts which constitutes the homicidal act, as distinguished from those facts which show whether the act was lawful or unlawful, and those which identify the accused as the person who committed it. Whenever a murder is alleged five issues arise: (1) Is the supposed victim dead? (2) Did he die from a homicidal act? (3) Who perpetrated the homicidal act? (4) Did he commit the act unlawfully? (5) Was the act prompted by malice aforethought? To the *corpus delicti* belong the answers to the first two questions. Some authorities assert that it also includes the answer to the fourth. Whether in the conduct of a trial the *corpus delicti* must be proved before an attempt is made to connect the accused with the homicidal act has been disputed. In actual practice evidence is introduced on all these questions in such order as the court and the parties judge convenient.

Rem. Formerly it was maintained that no proof of the homicidal death was sufficient for conviction unless the *body of the victim* had been found and identified; but modern relaxations of this rule have been admitted until, at present, both the death and its cause may be established by circumstantial evidence.

READ: Wharton, Criminal Law, § 311;
McClain, Criminal Law, §§ 396–398;
Rice, Criminal Evidence, §§ 293–299.

§ 539. Of Dying Declarations.

A peculiar species of evidence, admissible in prosecutions for unlawful homicide, consists of the dying declarations of the victim concerning the act of killing, and the person by whom it was committed. A *dying declaration* must be made by the person whose death is the subject of investigation; not by a mere spectator, nor even by another person who is dying from the same homicidal act. The declarant must, at the time he made the declaration, have been competent to testify under

oath; and the facts declared by him must have been such that, if he had been called as a witness in the case, he would have been allowed to state them. He must, when making the declaration, have been satisfied in his own mind that he was about to die, and any circumstances which indicate that he then entertained the faintest expectation of recovery will render the declaration inadmissible. How long he may survive after he has made the declaration is immaterial, provided the declaration itself was made under a conviction of impending death. The declaration must relate to the cause of death and the person killing, and may embrace all the details of the transaction of which the homicidal act was a part, but must not narrate past occurrences nor express mere opinions. It may be made in writing or by parol; may consist of a connected statement, or of answers to leading questions; and may be conveyed by words or signs, but must be intelligible and complete enough not to leave the meaning of the declarant open to conjecture. It need not be delivered in the presence of a magistrate nor of any other particular person, nor be reduced to writing by the hearer; but, if not written, those who testify to it in court must be able to repeat it as it was delivered, and not simply give their impressions as to its tenor and effect. Before the evidence of such a declaration is presented to a jury the judge must scrutinize its origin, authenticity, and contents, and determine whether any and how much of it is entitled to admission. In prosecutions for crimes other than unlawful homicide, although such crimes resulted in death, evidence of these dying declarations is excluded.

Rem. This species of evidence, though not given under oath nor subject to cross-examination, is permitted because of the necessity of the case, and because the solemnity of his known approaching death is presumed to clothe the statement of the victim with a sanctity equal to that which attaches to sworn testimony in open court. These declarations are generally offered by the State to show the guilt of the accused, and decisions may be found asserting that dying declarations exculpating him are inadmissible. But such a ruling rests upon no logical or legal principle, and is contradicted by superior authorities.

READ: 3 Russell on Crimes, pp. 388–397;
Archbold, Criminal Procedure, pp. 428–435;
Roscoe, Criminal Evidence, pp. 33–39;

Underhill, Criminal Evidence, §§ 102–114;
Wharton, Criminal Evidence, §§ 276–304;
McClain, Criminal Law, §§ 425–431;
Rice, Criminal Evidence, §§ 330–341.

§ 540. Of Mayhem.

Mayhem is the intentional and malicious injury or destruction of the limbs of another, whereby he is rendered less capable of defending himself against or annoying his adversary. Under the *limbs* are included the hands, feet, eyes, front teeth, and the male generative organs on whose integrity it is sometimes supposed that personal courage and energy largely depend. Mayhem may be committed by cutting, burning, striking, shooting, throwing corrosive fluids, or any other method which will produce the physical effect. But whatever method be employed the purpose of the offender must be, and must be proved to be, to maim and disfigure his victim and not simply to beat him either unlawfully or in self-defense. Hence wounds inflicted by accident, or in the ordinary course of a combat, or even in a premeditated assault, if mayhem, as such, was not intended, although the wounds may result in the loss or destruction of a limb, do not amount to mayhem whatever other crime of greater or less magnitude they may involve. The statement, sometimes made, that the malicious intent may be presumed from the fact of mayhem, is true only where the character of the act and the circumstances which attend it, as distinguished from its consequences, afford reasonable ground for that presumption.

Rem. In certain States mayhem is extended by local statutes to cover injuries which disfigure the body, as well as those which impair its fighting powers. In some States also any unlawful maiming or disfigurement is mayhem, whether or not it is prompted by a malicious intent.

READ: 4 Bl. Com., pp. 205–208;
Hawley, Criminal Law, pp. 167–169;
Desty, Criminal Law, §§ 132–132 *b*;
May, Law of Crimes, § 217;
Clark and Marshall, Criminal Law, §§ 221–223;
Clark, Criminal Law (Tiffany Ed.), §§ 77, 78;
3 Russell on Crimes, pp. 277, 278;
Archbold, Criminal Procedure, pp. 876–881;

2 Bishop, Criminal Law, §§ 1001–1008;
Bishop, Statutory Crimes, § 316;
Wharton, Criminal Law, §§ 581–584;
McClain, Criminal Law, §§ 432–435.

§ 541. Of Battery.

Battery is the infliction of any unlawful physical violence upon the person of another. Any wrongful act, however slight, whereby either the wrongdoer or his instrument of wrongdoing is brought into contact with the body of another, or with anything so connected with his body as to be legally identified therewith, is a battery. The purpose and intent in this crime are immaterial. If the violence is voluntary, and is neither justified nor excused by law, the act is battery. When severe injuries result from battery the legal gravity of the crime may be increased, as well as the penalty imposed on the offender.

Rem. The instrument by which a battery is committed may be and remain under the control of the wrongdoer until the battery is completed, — as where he uses a club or dagger; or the instrument may be set in motion by him and then passing from his control, but following the impulse and direction he has given it, may proceed through space to accomplish his designs, — as where he fires a bullet, sends poison by the mail, or incites a ferocious animal to make the attack. In both these cases the battery is equally his act, however long the interval before it terminates upon his victim.

READ: 4 Bl. Com., pp. 216–218;
Hawley, Criminal Law, pp. 154–162;
Clark, Criminal Law (Tiffany Ed.), §§ 81–83;
Kenney, Criminal Law, pp. 142–150;
2 Bishop, Criminal Law, §§ 22–41 *a*, 69–72 *a*;
Wharton, Criminal Law, §§ 603–640;
McClain, Criminal Law, §§ 230–253.

§ 542. Of Criminal Assault.

A *criminal assault* is an intentional attempt to do unlawful physical violence to another, coupled with a present ability to carry such intent into execution. To constitute this crime there must coexist the intention, the capability, and the external endeavor to commit a battery; and the place of none of these elements is supplied by any fear or alarm of the person assaulted.

A criminal assault cannot be committed by mere negligence, nor by an act of violence performed at the request of the victim in order to achieve a lawful purpose. An assault may be aggravated in guilt as well as penalty by the official character of the person assaulted, the place where the assault occurs, or the specific intent with which it is committed.

Rem. This crime is not to be confounded with a simple assault which is a mere private wrong, and consists in the manifestation by acts of a present purpose to commit a battery, though there may be no actual ability to carry the intent into effect; nor with apparent assaults which excuse the exercise of force in self-defence, or alarm the victim without sufficient actual cause. Thus to fire a pistol *near* to another, but not *at* him, with the design to scare him; or to point at him an unloaded gun, though he may believe it to be loaded; or to level a loaded firearm upon him, but at too great a distance for the shot to injure him, — are not criminal assaults, though they may form the basis of a civil action, or justify a forcible resistance. The character of an assault, whether criminal or civil, is not changed by the annexation to it of a condition with which the person assaulted is under no legal obligation to comply, — as where the assailant offers to desist provided the victim will submit to certain terms. But if the condition is predicated of the circumstances or occasion, and demands no action or forbearance on the part of the victim, it may negative the intention to do violence, and so disprove an essential element of the crime.

READ: Desty, Criminal Law, §§ 130–130 *c*;
May, Law of Crimes, §§ 204–216;
Clark and Marshall, Criminal Law, §§ 197–220;
Kenney, Criminal Law, pp. 133–142;
3 Russell on Crimes, pp. 304–320;
Archbold, Criminal Procedure, pp. 907–927;
2 Bishop, Criminal Law, §§ 42–62;
Wharton, Criminal Law, §§ 645 *d*–652 *a*;
McClain, Criminal Law, §§ 254–262.

§ 543. Of Assaults Aggravated by a Specific Intent.

All the more heinous crimes against the persons of individuals include a criminal assault, and when an assault is committed with the intent thereby to perpetrate these crimes the guilt of the actor is only less than if his purpose had succeeded. Such assaults are *attempts* to perpetrate the greater criminal act, and fall short of it through some condition or occurrence over which the actor

has no conscious and immediate control. Thus an assault with intent to kill is an endeavor to commit manslaughter; an assault with intent to murder is a deliberate and malicious effort to take human life; an assault with intent to ravish or to rob would have been rape or robbery if the design of the assailant had not been in some manner frustrated. In all such cases the intent is a true *specific intent,* and is a distinct and essential ingredient in the crime which must be proved by competent evidence like any other matter of fact. Such intent may be inferred from the acts performed, or from previous threats or preparations, but must be shown to have embraced in purpose all the elements of the greater crime. Hence there is no assault with intent to ravish unless the assailant intended to overcome by every necessary force any resistance which might be offered by his victim; no assault with intent to murder unless the facts disclose that the attack was made with malice aforethought. No such intent can ever exist in the mind of a sane person who knows that he is unable to commit the greater crime; but obstacles of which he has no knowledge or adequate appreciation, although in fact they ensure the failure of his enterprise, are not inconsistent with the evil purpose which gives the act its aggravated character.

Rem. In reference to these assaults, as well as other attempts, one question of great difficulty sometimes arises which has met with different replies. It is this, — whether a person can, in law, intend to do an act which is inherently impossible when it, at the time, appears possible to him. For example, can a man assault, with intent to commit a rape, another man who is disguised as a woman and who is believed by the assailant to be a woman? or can one person assault another with intent to rob when the one assaulted possesses nothing of which he could be robbed? To this question some authorities, holding that ability must concur with intent in order to constitute a criminal assault, reply in the negative. Others, measuring the guilt of the actor by the condition of his mind and will, hold him responsible as if the crime intended could have been committed.

READ: Hawley, Criminal Law, pp. 162, 163;
Desty, Criminal Law, §§ 131–131 *e*;
Archbold, Criminal Procedure, pp. 863–876, 885–896, 927–934, 1010–1014;
Wharton, Criminal Law, §§ 576, 577, 640 *a*–645 *c*;
McClain, Criminal Law, §§ 263–281, 462–465.

§ 544. Of Rape.

Rape is the unlawful carnal knowledge of a woman without her consent. *Carnal knowledge* consists in the actual penetration, to some extent, of the sexual organs of the female by the sexual organ of the male, with or without seminal emission; and is complete in the eye of the law whatever the distance or duration of such penetration may be. Carnal knowledge is *unlawful* whenever it takes place between a man and a woman who is not at the time his lawful wife. An unlawful carnal knowledge is a rape unless the woman intelligently and voluntarily *consents* thereto. If she does not understand the nature of the act, either through defect of intellect or temporary unconsciousness, or imposition on the part of the ravisher; or if her will is overcome by force or fear or drugs, — her physical submission does not prove consent. It has also been held that, although she knows the nature of the act, if her acquiescence is obtained by her assailant by falsely personating her husband, she does not consent, because consent to carnal knowledge involves not only consent to the act itself but to the person by whom it is to be performed. Where, however, she voluntarily and intelligently permits the intercourse, yielding to persuasion or to deceitful promises or to fraudulent representations other than as to the nature of the act or the person of the tempter, the carnal knowledge is not rape, although she may have at first refused and have manifested her opposition by forcible resistance. The proper evidence of her want of consent, and that which the law expects her to exhibit under ordinary circumstances, is the *persistent physical defence* of her person until she is overpowered by *superior force;* and exceptions to this requirement are recognized only when equal proof of the absence of consent is afforded by other circumstances which demonstrate her lack of knowledge or her non-concurrence in the act.

Rem. Females below a certain age, now generally fixed by local statutes, are conclusively presumed to be incapable of consenting to unlawful sexual acts, and intercourse with them outside of wedlock is, therefore, always rape even when it takes place at the solicitation of the woman, and in the belief that she is old enough to give consent. Where the assailant is a boy under fourteen his physical capacity for sexual intercourse must be affirmatively proved.

READ: 4 Bl. Com., pp. 210–212;
Hawley, Criminal Law, pp. 169–173;
Desty, Criminal Law, §§ 133–134 *a*;
May, Law of Crimes, §§ 241–244;
Clark and Marshall, Criminal Law, §§ 293–302;
Clark, Criminal Law (Tiffany Ed.), §§ 79, 80;
Kenney, Criminal Law, pp. 151–154;
3 Russell on Crimes, pp. 223–232;
Archbold, Criminal Procedure, pp. 994–1003;
2 Bishop, Criminal Law, §§ 1107–1136;
Wharton, Criminal Law, §§ 550–564;
McClain, Criminal Law, §§ 438–451.

§ 545. Of Rape: the Credibility of the Victim as a Witness.

The unlawful carnal knowledge of any woman without her consent is a rape, whatever may have been her habits as to chastity or her previous sexual relations toward her ravisher. On the other hand, the law recognizes that sexual appetites exist in females as well as in males, and that sexual acts even between unmarried persons are, in most cases, on both sides intelligent and voluntary. Hence, as in prosecutions for rape, the woman is frequently the sole available witness, it necessarily regards her testimony, especially as to the matter of consent, with grave suspicion; and requires corroboration of her denial of consent either in her general character or her contemporaneous conduct. If she is of bad repute; or if she concealed the injury after she had an opportunity to complain; or if the place where she alleges it to have been committed were public and inhabited and she made no outcry, — these circumstances reflect serious discredit on her story. But if her reputation is good; if she presently disclosed the offence and made pursuit of the offender; if she showed signs and marks of the injury; if the place described by her as the scene of the occurrence is remote from observation; and if the alleged offender afterwards concealed himself, — her testimony is accorded great weight, and may of itself be sufficient for conviction.

Rem. In spite of the importance naturally attached to the testimony of the alleged victim it must always be remembered that rape is a grievous crime, that its punishment is most severe, that accusations of it are often resorted to for purposes of extortion or revenge, and that legal history presents many cases

where convictions upon such evidence have afterwards been shown to have been erroneous and unjust. Wise and careful judges, therefore, usually endeavor to prevent them, unless the testimony of the woman is substantially corroborated by other proof, over the fabrication of which she could have had no control.

READ: 4 Bl. Com., pp. 213–216;
3 Russell on Crimes, pp. 232–236;
Archbold, Criminal Procedure, pp. 1003–1010;
Underhill, Criminal Evidence, §§ 407–418;
Wharton, Criminal Law, §§ 565–568;
McClain, Criminal Law, §§ 455–461.

§ 546. Of Abduction.

Abduction is the unlawful removal by force or fraud, from the control of her parents or guardians, of a female not yet old enough to marry without their consent, for purposes of marriage, prostitution, or concubinage. The essence of this crime consists in the unlawful acquisition of influence and power over a female infant in order to lead her into sexual relations either with the abductor or with some other person. It differs from rape in that it contemplates a voluntary surrender by her of her person, when deprived of the protection of her family and dependent on the good will of her abductor. It differs from seduction in that the latter operates through promises or persuasion, and does not require force or its equivalent in fraud. The *voluntary elopement* of a girl from home with a lover or seducer is not abduction, unless she is so young that her consent is presumed by law to be impossible.

Rem. This offence was originally prohibited, in a somewhat different form, by an ancient English statute, and is now forbidden by local laws in this country. These laws vary from one another in reference to the age of the woman, the method of her removal, its specific purpose, her previous chastity, and the place to which she is conveyed.

READ: 4 Bl. Com., pp. 208–210;
Hawley, Criminal Law, pp. 165–167;
Desty, Criminal Law, §§ 136–137 *a*;
May, Law of Crimes, § 198;
Clark and Marshall, Criminal Law, §§ 230–232;
Clark, Criminal Law (Tiffany Ed.), §§ 86, 87;
Kenney, Criminal Law, p. 151;

Archbold, Criminal Procedure, pp. 988–993;
1 Bishop, Criminal Law, §§ 533–542;
Wharton, Criminal Law, §§ 586–589;
McClain, Criminal Law, §§ 1100–1108.

§ 547. Of Seduction.

Seduction is the procurement, by promises or persuasion, of unlawful sexual intercourse with an unmarried woman of previously chaste character. In this crime fraud and force are wanting. The parties meet at first on equal ground, but through the influence obtained by the man over the woman his persuasions, flattery, or promises prevail over her chaste instincts and resolutions, and she voluntarily yields herself to his desires. The woman may be a spinster, a widow, or a divorced wife; if she were a married woman the crime would be adultery. She must also at the time be chaste, but her chastity may be either virginal, or that of a reformed prostitute; and it must be real and not merely pretended or reputed, since if her instincts and desires are lustful it is to these, and not to the seduction, that her downfall is to be attributed. She must be of the age of consent, and being above that may be of any age. Her previous chastity must be proved by the State, and may be contradicted by the defence by any proper evidence. If she is the only witness for the State her testimony requires corroboration, and this may be afforded by circumstances which would support her accusation if the charge were rape. A male infant may be guilty of this crime if he is old enough to possess criminal capacity, and able to perform the sexual act. The subsequent lawful marriage of the parties condones the injury on her part, and by closing her lips against her husband generally puts an end to the criminal proceedings.

Rem. In some of our States the species of persuasion which are to be deemed adequate to overcome virtue are defined by law, — such as a promise to marry; in others, the question whether the persuasion was sufficient to cast upon the man the responsibility for her conduct is left to be determined by the jury. The offer of a money compensation for a future sexual intercourse is not seduction.

Read: Hawley, Criminal Law, pp. 282–286;
Desty, Criminal Law, §§ 135–135 *b*;
May, Law of Crimes, § 197;

Clark and Marshall, Criminal Law, § 464;
Clark, Criminal Law (Tiffany Ed.), § 128;
Kenney, Criminal Law, pp. 154, 155;
Bishop, Statutory Crimes, §§ 625–652;
Wharton, Criminal Law, §§ 1756–1765;
McClain, Criminal Law, §§ 1109–1119.

§ 548. Of Crimes against Personal Health.

Any wrongful action or omission which is prejudicial to the public health is a public nuisance, and punishable as a crime. It is also sometimes stated, as if it were the necessary antithesis of the foregoing proposition, that no injury to health can be a crime unless it affects the public as distinguished from one or several individuals. This is neither logically nor legally correct. All health is the health of individual men and women, and all injuries to health are injuries to individual men and women, and are of the same intrinsic nature and produce the same physical consequences whether the individuals suffering from them are few or many. The law may thus as appropriately and justly forbid and punish injuries to the health of one individual as those which inflict pain or discomfort on a multitude. And this it does though under a different name and with a narrower range of remedies. Thus one who wilfully adulterates food or medicine and gives it to another, or transmits it to him through an agent, is guilty of an assault; though if he had distributed it to many his crime would have been a public nuisance. The same principle would properly apply to any wilful and malicious action which sets in motion forces whose disagreeable or morbific energies impair the health of any individual, although the action was not really an assault but answered rather to the definition of a private nuisance. Particular offences belonging to this class of crimes are, for the most part, defined and prohibited by local statutes and police regulations.

Rem. Negligent omissions, however, although made crimes when they affect the public health because the public have no civil action whereby they can suppress them, are not tainted with that wilfulness and malice which alone invokes the vengeance of the State; and, therefore, unless gross and wanton, are generally left to private methods of prevention and redress.

§ 549. Of Crimes against Personal Reputation.

Injuries to reputation, whether civil or criminal, consist in libel, slander, or malicious prosecution. A *criminal libel* is an offence of double aspect, at once provoking a breach of the public peace and inflicting a malicious injury upon an individual. Although usually prosecuted as a breach of the peace its unwarrantable attack upon the honor and fair fame of the individual is not wholly ignored; and where in view of its remote damage to the public its penalty might be remitted, its enormity as a false and malicious defamation of a helpless victim sometimes demands a serious punishment. *Slander*, though principally a private wrong, is often punishable as a mode of stirring up contention and strife, and in this aspect is a breach of the peace, rather than an injury to personal reputation. *Malicious prosecution* similarly affords a ground for a civil action, and is not commonly regarded as a crime, unless when prompted by actual malice. A *malicious conspiracy* to injure the reputation of another is always criminal.

Rem. Offences against personal reputation, which originate in actual malice and ill-will against the individual whom they attack, differ from criminal assault only in the physical action by which their malice is expressed, and may be as productive of lasting injury as any battery or mayhem perpetrated on their victim. The tendency of modern law is to prevent such injuries by giving to the victim an efficient and inexpensive remedy, without compelling him to resort to the tedious and costly redress of a civil action. Hence, almost every possible wrong of this character is now covered by the criminal legislation of our different States, and the pursuit of private remedies for them has largely disappeared from our courts.

READ: Dwight, Law of Persons and Property, pp. 91–93.

§ 550. Of False Imprisonment.

False Imprisonment is the unlawful detention of the person of another. Any restraint placed upon the freedom of another by compelling him to remain quiet when he desires to move, or to move in one direction or method when he wills to move in another, is *detention*, whether the restraint is accomplished by force or threats, or any other form of coercion or duress. It may

occur in a building or other enclosure, or on the open highway; it may endure for a moment or indefinitely; it may or may not produce some actual loss or injury. *Detention is unlawful* whenever it is not justified as the execution of legal process or as the assertion of a legal right; and the burden of proving such justification rests on the detainer. All persons engaged in the detention, whether as participators in the act or as its procurers, are guilty of the offense and are liable to punishment.

Rem. This crime involves the same physical acts and their consequences as the private wrong of false imprisonment. To be a crime, however, the act of detention must be wilful and malicious, and not accidental nor the result of a *bona fide* mistake on the part of the detainer. As the force used in the detention generally amounts to an assault, and sometimes to a battery, prosecutions for it are commonly instituted under those names.

READ: 4 Bl. Com., p. 218;
Hawley, Criminal Law, pp. 163, 164;
Desty, Criminal Law, §§ 139–139 *a*;
May, Law of Crimes, § 240;
Clark and Marshall, Criminal Law, §§ 224–237;
Clark, Criminal Law (Tiffany Ed.), § 84;
Kenney, Criminal Law, p. 150;
Archbold, Criminal Procedure, pp. 946–948;
2 Bishop, Criminal Law, §§ 746–749;
Wharton, Criminal Law, § 591;
McClain, Criminal Law, §§ 485–488.

§ 551. Of Kidnapping.

Kidnapping is an aggravated form of false imprisonment. The aggravation consists in the removal of the person unlawfully detained from his own State or country, and from the jurisdiction and protection of its laws. The removal may be accomplished by force or threats constraining the person against his will, or by fraudulent representations inducing an immature or weak-minded person to acquiesce in the removal. This crime has sometimes been treated by the law as a capital offence, sometimes as a grave felony, and sometimes as a simple misdemeanor. The purpose of the removal, — as whether it be to exact a ransom, or to sell into slavery, or to subject to prostitution, or to obtain possession of a child or wife to whose society the remover has a natural if not a legal right, — determines the enormity of

the offence on moral grounds, and should be recognized in prescribing its punishment.

Rem. The name of "*kidnapping*" is often applied to any form of child-stealing without reference to the purpose or to the place of removal; thus making the meaning of the term equivalent to that of false imprisonment. The real essence of the crime here defined, however, consists in the placing of the victim beyond the reach of the laws of his own State, and thereby depriving him of the protection and redress to which he is entitled as a citizen.

READ: 4 Bl. Com., p. 219;
Hawley, Criminal Law, pp. 164, 165;
Desty, Criminal Law, §§ 138–138 *a*;
May, Law of Crimes, § 199;
Clark and Marshall, Criminal Law, §§ 228, 229;
Clark, Criminal Law (Tiffany Ed.), § 85;
Kenney, Criminal Law, p. 151;
Archbold, Criminal Procedure, pp. 982–987;
2 Bishop, Criminal Law, §§ 750–756;
Wharton, Criminal Law, § 590;
McClain, Criminal Law, §§ 489–491.

§ 552. Of Boycotting.

Wrongs against *personal liberty* may be committed by any conduct toward another which interferes with his enjoyment of the lawful right of self-control in his business actions and forbearances. Such conduct may assume many forms affecting the use of capital, the exercise of talent, the application of labor, the freedom of contract, or the liberty of trade. Subject to those restrictions which the State imposes upon all its citizens for the common good, every person has the right to apply his labor and property according to his own judgment; and the protection of this right often requires that acts preventing its enjoyment should be punished as crimes. Hitherto, offences of this species have generally involved some form of conspiracy, — the conspirators agreeing upon certain lines of conduct intended to force their victim into actions or forbearances against his own desires and interests, and by collectively pursuing these lines of conduct inflicting upon him some unlawful injury. One of the most recent forms of this offence is that which isolates the victim from social or business intercourse by inducing other

persons to avoid him. From the first prominent sufferer through this concerted isolation the name "*Boycotting*" was derived, which in the absence of any other special appellation is now used to denote the crime itself.

Rem. Conspiracy is the agreement of two or more persons to do an unlawful act, or to do a lawful act in an unlawful manner. It requires a concert of intent and will between the conspirators, not a mere coincidence of purpose and action. Its essence resides in the combination of numbers against an individual, and the oppression and public disaster which might result. In examining the authorities on this subject some confusion may be avoided by keeping in mind the fact that the character of a conspiracy is determined by the unlawful purpose to which the concerted action is directed, and not by the particular overt acts performed by the conspirators. Thus while it is true that one man may innocently persuade another to join a labor union, or to trade at a certain store, or not to engage in a specific employment, it does not follow that a number of persons can lawfully unite together, and through the use of such persuasions oppress and injure others by depriving them of the advantages of their ordinary trade and labor. The difficulty of connecting the apparently innocent overt act with the unlawful purpose by sufficient evidence does not affect the criminal liability which attaches to the actors when such connection is once established.

READ: Andrews, American Law, §§ 679–681;
Hawley, Criminal Law, pp. 108–112.

SECTION IV

OF CRIMES AGAINST THE PROPERTY OF INDIVIDUALS

§ 553. Of Property as the Subject of Crime.

Property rights, although in their nature less valuable than personal rights, are held in such estimation by the law that many injuries thereto, either because of their consequences or their malice, are regarded as public wrongs. This is true as well in reference to personal property as to real, to choses in action as well as to choses in possession. There is, however, one species of property to which the law attaches a peculiar sanctity, namely, the habitation of the citizen. The Englishman's house has always been considered as his castle, into which

without his permission, or due process of law, not even the king could enter; and his rights in it have been protected not only by constituting him its forcible defender, but by treating its invasion as a crime of unusual gravity. The principal crimes against the habitation, now forbidden and punished by our laws, are Arson and Burglary; those of less gravity consist of some form of Malicious Mischief. Crimes against other property are numerous and of varied character, depending in many instances upon local statutes.

Rem. Of the seven common law felonies still recognized by our general laws, three are crimes against the person, — to wit, Murder, Manslaughter, and Rape; and four are crimes against property, — to wit, Arson, Burglary, Robbery, and Theft. Of these four the first two are crimes against the habitation, the other two are crimes against personal property. The attitude of the law toward these offences is manifest from the fact that, with the exception of trivial cases of the latter, they were all formerly punished with death.

READ: 4 Bl. Com., p. 220.

§ 554. Of Arson: the Unlawful Burning.

Arson is the unlawful burning of the dwelling house of another. To constitute a *burning* either the whole house, or some integral part thereof, must be actually destroyed by fire. If it be merely blackened by smoke or scorched by flame, without the destruction of its substance, there is no burning. The destruction by fire of personal property contained in the dwelling is not a burning of the house; but if any part of the building, however small, suffers the disintegration of its fibre through the action of the fire the burning is complete, though the fire may have endured but for a moment and have then gone out of itself. Every *burning is unlawful* which is wilful, and is not in pursuance of some legal right or duty.

Rem. An *involuntary burning* by negligence or accident is not arson; nor is a wilful burning criminal when done by competent authority in order to suppress a general conflagration, or subserve some necessity of war. But a burning which is wilful and without authority is arson, although the incendiary did not intend to destroy the house which is actually consumed, — as when the

house is ignited by means employed to perpetrate a different felony, or where a person wilfully sets on fire his own house under circumstances which render it apparent that the adjacent houses of other owners will also be destroyed.

READ: 4 Bl. Com., p. 222;
Hawley, Criminal Law, pp. 176, 177;
Desty, Criminal Law, § 143 *g*;
May, Law of Crimes, §§ 249, 255;
Clark and Marshall, Criminal Law, §§ 410, 414, 415;
Clark, Criminal Law (Tiffany Ed.), §§ 88–90;
Kenney, Criminal Law, pp. 157–160;
2 Bishop, Criminal Law, §§ 8–10;
Bishop, Statutory Crimes, §§ 310, 311;
Wharton, Criminal Law, §§ 825–832;
McClain, Criminal Law, § 523.

§ 555. Of Arson: the Dwelling House of Another.

A house does not become a *dwelling house*, as that term is employed in the definition of arson, until it has been used as a human habitation. It ceases to be such when its use for that purpose is finally abandoned. The temporary absence of its occupants, or its vacancy during a change of tenancy, does not alter its character. The dwelling house includes all other buildings which immediately communicate therewith; or are in the same curtilage or common fence; or are within a reasonable distance from the actual dwelling and in their use are subservient thereto. The *other person*, to whom the dwelling house in this crime must belong, is he in whom resides the legal right of occupation. The offence being one against habitation and not ownership, a man cannot commit it by burning a house in which he alone has the right to abide, whether he be the owner in fee, or the tenant for years, or a mere tenant at will. But a burning by the landlord while the premises are in the occupation of his tenant, or by a servant living in the house of his master, is the same offence as if the incendiary had been a stranger.

Rem. The crime of arson is a distinct offence from the unlawful burnings prohibited by statute where the structures burned are not human habitations, or are occupied by the incendiary who destroys them in order to obtain insurance money, or for other malicious purposes, and which are often called "*statutory arson.*"

READ: 4 Bl. Com., p. 221;
Hawley, Criminal Law, pp. 174–176;
Desty, Criminal Law, §§ 143–143 *f*;
May, Law of Crimes, §§ 250–254, 268;
Clark and Marshall, Criminal Law, §§ 411–413, 416;
2 Bishop, Criminal Law, §§ 11–21;
Wharton, Criminal Law, §§ 838–844;
McClain, Criminal Law, §§ 517–522, 524–526.

§ 556. Of Burglary: the Breaking and Entering.

Burglary is the breaking and entering, in the night season, of the dwelling house of another, against his will, and with the intent to commit a felony therein. The *breaking* consists in the removal of any portion of the house which is relied upon by its inhabitants as a security against intrusion, and which so far as the nature of the case permits actually serves as such security. Thus the opening of a door or window that is completely shut; or the enlargement of a hole previously too small for ingress; or the removal of a screen or netting that is fastened down; or the descent through a passage which, like a chimney, cannot be entirely closed, is a breaking; but not the raising of a window which is partly open; or the pushing back of a door that stands ajar; or the climbing through an unnecessary but sufficient aperture already made. Breaking does not always involve the exercise of physical force, — for to procure an entrance by craft or intimidation, or by conspiring with an inmate, is no less a breaking than if the entrance were achieved by violence. The breaking may affect either the outer walls of the house, or the interior divisions by which one portion of the house is separated from the others. A breaking may be for purposes of egress as well as ingress, for one who enters in the night season with felonious intent, without breaking, completes his crime if also in the night season he breaks in order to get out. The *entering* consists in the insertion into the interior of the house, or past the dividing line which distinguishes between the outside and the inside, of the whole body of the intruder or of any part thereof, or of something which is either connected with his body or is under his immediate control, and is attempted to be used in the commission of the proposed felony. Thus the thrusting of the hand or of a cane or a hook inside the dividing

line, in order to draw out the goods which the intruder intends to steal, or of a pistol in order to shoot or to extort money from the inmates, is a complete entry. But if the tools, which are used only for the breaking and not for the ulterior felony, only penetrate the walls, or accidentally drop inside, this is a mere incident of the breaking, and does not constitute an entry. Where, however, the same act which accomplishes the breaking also through its natural consequences perpetrates the felony, — as where the floor of a bank vault is perforated by a drill and through the orifice the coin contained therein falls by its own weight into the hands of the thief, the intrusion of the instrument of breaking is likewise an entry.

Rem. In burglary the breaking and the entering must be related to each other by a *community* of *intent*, since to break at one time for one purpose and to enter at another time for another purpose does not make the breaking and entering constituent elements of the same crime. The breaking and entering must also be *against the will* of the owner of the dwelling, — for if he consents to it or connives at it, even though his purpose be to entrap a criminal, there can be no such forcible or fraudulent intrusion as is necessary to a burglary.

READ: 4 Bl. Com., pp. 223, 226, 227;
Hawley, Criminal Law, pp. 177–182;
Desty, Criminal Law, §§ 141–141 *b*;
May, Law of Crimes, §§ 256–263;
Clark and Marshall, Criminal Law, §§ 400, 404, 405;
Clark, Criminal Law (Tiffany Ed.), §§ 91–93;
Kenney, Criminal Law, pp. 167–170;
2 Russell on Crimes, pp. 1–14;
Archbold, Criminal Procedure, pp. 1069–1071, 1077–1086;
2 Bishop, Criminal Law, §§ 90–100;
Bishop, Statutory Crimes, § 312;
Wharton, Criminal Law, §§ 758–780;
McClain, Criminal Law, §§ 500–503.

§ 557. Of Burglary: the Dwelling House.

The *dwelling house* in burglary, as in arson, signifies a building which has actually been used for human habitation, and whose use for that purpose has not been permanently abandoned. It embraces all houses and outhouses within or without the curtilage, which are parcel of, and in their use are sub-

servient to, the building occupied as an abode. When under the same roof there are some apartments used for residence and others for a different purpose, such as stores or workshops, only the portions of the building which are used for residence are within the dwelling house. Where several families reside under one roof but in different portions of the building, the portion of each family being distinct and separated from the others and having a different outward entrance, each portion of the building is, of itself, a dwelling house. Suites of rooms in a college or an inn of court, as well as lodgings in a private habitation, have also been held to be dwelling houses if the landlord does not live under the same roof, or if he and his tenants enter by separate doors. But where there is only one external entrance, and the landlord himself resides in any portion of the building, the entire building is but one dwelling house of which he is the head, while the other occupants are in some sense members of his family. The *ownership of the house* in burglary is in the person having the legal right of possession, whether the house is an independent building or one of several distinct family apartments under the same roof. Burglary may thus be committed by the occupant of one apartment against another, or by a landlord against any of his tenants.

Rem. Where several families occupy distinct apartments under one roof, each with an entrance from a common court or corridor, the division walls which separate the apartments are outside walls in reference to the crime of burglary, and can be broken and entered in the same sense, and with the same legal consequences, as if the apartment was a different building. The dwelling house of a wife, who lives apart from her husband, is in the ownership of the husband.

READ: 4 Bl. Com., pp. 224–226;
Hawley, Criminal Law, pp. 182–185;
Desty, Criminal Law, §§ 141 *g*–141 *j*;
May, Law of Crimes, §§ 264, 265;
Clark and Marshall, Criminal Law, §§ 401–403;
Kenney, Criminal Law, pp. 165–167;
2 Russell on Crimes, pp. 14–37;
Archbold, Criminal Procedure, pp. 1086–1101;
2 Bishop, Criminal Law, §§ 104–108;
Bishop, Statutory Crimes, §§ 277–290;
Wharton, Criminal Law, §§ 781–791, 798–805;
McClain, Criminal Law, §§ 493–499.

§ 558. Of Burglary: the Night Season.

The *night season,* as that term is used in defining burglary, signifies that portion of the night which intervenes between the total disappearance of daylight in the evening and its reappearance in the morning. *Daylight exists* as long and as soon as by the natural light of the day the features of a person can be reasonably discerned, so that it can be determined whether he be friend or foe. Both the breaking and the entering must occur in the night season, but not necessarily in the same night. If both are committed in the night season and in pursuance of the same felonious design, though separated by an interval of several days, it is sufficient.

Rem. Moonlight, however brilliant, is not as to this crime the equivalent of daylight; nor is any artificial light radiating from streets or surrounding houses; and the presence or absence of these is immaterial.

READ: 4 Bl. Com., p. 224;
Hawley, Criminal Law, pp. 185, 186;
Desty, Criminal Law, § 141 *j*;
May, Law of Crimes, § 266;
Clark and Marshall, Criminal Law, § 406;
Kenney, Criminal Law, pp. 170, 171;
2 Russell on Crimes, pp. 37, 38;
Archbold, Criminal Procedure, pp. 1101–1103;
2 Bishop, Criminal Law, §§ 101–103;
Bishop, Statutory Crimes, § 276;
Wharton, Criminal Law, §§ 806–809;
McClain, Criminal Law, § 504.

§ 559. Of Burglary: the Felonious Intent.

The *felonious intent,* with which the breaking and entering must be committed, is an intent to perpetrate some felony within the dwelling house. This intent is a specific intent and is, therefore, a necessary ingredient of the criminal act. It is a matter of fact which must be affirmatively proved by the State, and cannot be presumed by law from the breaking and entering, though the jury may infer it from the circumstances attending the intrusion. To break and enter without such intent, as with the intent to commit a misdemeanor, or to occupy a place for shelter, or to inflict damage other than burning

upon the house itself is not burglary; nor unless made a crime by statute does it exceed a trespass.

Rem. The felonious intent may be to commit a murder, manslaughter, rape, robbery, larceny, or any other crime which, if completed, would render the intruder guilty of a separate felony. To carry out the felonious intent by perpetrating the intended felony would make the intruder liable for two offences — the burglary and the intended felony — for both of which he might be prosecuted.

READ: 4 Bl. Com., pp. 227, 228;
Hawley, Criminal Law, pp. 186, 187;
May, Law of Crimes, § 267;
Clark and Marshall, Criminal Law, §§ 407, 408;
Kenney, Criminal Law, pp. 171, 172;
2 Russell on Crimes, pp. 38–43;
Archbold, Criminal Procedure, pp. 1103–1108;
2 Bishop, Criminal Law, §§ 109–117;
Wharton, Criminal Law, §§ 810–822;
McClain, Criminal Law, §§ 505–507.

§ 560. Of Burglary: Statutory Burglary.

With the development of society and the extension of commerce it has been found necessary to afford to structures other than mere dwelling houses the same protection against forcible intrusion. Hence by the local laws of many States the crime of Statutory Burglary has been defined and even made a felony. Whether made felonies or not by statute such crimes are generally punished with less severity than the common law felony whose name they bear.

Rem. Among the offences prohibited by these local statutes are the breaking and entering in the night season of any house where personal property is stored; or of any vehicle of traffic containing goods and merchandise; or of any church or other public building. Other statutes place in the same category of crimes the forcible entering of any dwelling house in the daytime.

READ: Clark and Marshall, Criminal Law, § 409;
Kenney, Criminal Law, p. 173;
2 Bishop, Criminal Law, §§ 118–120;
Bishop, Statutory Crimes, §§ 291–297;
Wharton, Criminal Law, §§ 792–797 *a*.

§ 561. Of Larceny: the Taking and Carrying Away.

Larceny or *theft* is the wrongful forcible or fraudulent severance of the personal property of another from the possession of its owner, against his will and with intent to steal the same. The *severance* of the property includes both a taking and a carrying away. The *taking* is the wrongful assumption of physical control over the property, — its prehension as distinguished from its amotion from one place to another. The *carrying away* is its wrongful removal from the place where it was before the prehension to some other place. To take without carrying away is not severance; but to remove it even for an instant or to the shortest possible distance, if the physical connection between the object and the place be once entirely broken, completes the severance though the property be immediately returned to its original location. Thus to snatch an article out of its place of deposit and immediately drop it back again was held to be a severance; but to seize an article connected by a long string with its place of deposit, and run away with it so far as the length of the string would allow and then drop it, the string remaining unbroken, was held not to be a carrying away. The severance may be *forcible or fraudulent*. To violently remove an inanimate object; to entice away an animal by words or show of food; to accept an article delivered up through fear or mistake; to apply property received from another to a purpose different from that for which it was received; to pick up goods that have been lost or to retain those which have come into one's hands by accident, — are all instances of the various methods by which unlawful severance may be accomplished. The severance must be from the *possession of the owner*. *Possession* here signifies the actual or constructive physical control over the property with the right, for the time being, to retain that control. It is distinguished from *custody*, which is the actual physical control over the property without the right to retain control as against the owner or possessor. Thus, as the physical control over an article by a servant or agent is mere custody and not possession, the taking and carrying away of the article from the servant is not theft unless it is so removed as to be put beyond the possession of its owner. The severance must also be *against the owner's will*. If he consents thereto,

even though his consent be obtained by fraud, there is no larceny. But such consent must relate to a transfer of possession as distinguished from a transfer of custody, for one who secures the custody of an article by craft or persuasion, and then detains it against the owner's will, deprives the owner of its possession as truly as if no transfer of its custody had been previously made. The severance of property from the owner's possession in larceny is not in law, however, an instantaneous but a *continuing act,* perpetually repeated by each exercise of control over the property until it is surrendered or reclaimed; and, therefore, to whatever place the taker may remove it in that place the act of severance occurs. Still the crime itself is but a single crime, and having been punished in one locality, to which the property is carried, it cannot be prosecuted in another.

Rem. The distinction between custody and possession is particularly important in reference to larceny, especially as to the persons by whom theft may be committed, and the person from whose possession the property must be charged to have been taken. Thus a stranger does not steal the property from a servant or agent but only from the owner or possessor, and a servant or agent can steal it from the owner by misappropriating it while it is in his own custody. A bailee, on the other hand, having the possession and not the mere custody, cannot become guilty of stealing the property unless he first reduces his possession into custody by returning the property to the owner, or by so abusing his trust as to lose his right to its possession. Severance of property from the possession of the owner becomes complete whenever the property passes into the physical control of one who claims possession in himself, whether this claim be made by acts or words. Thus a servant, having already the custody of the property, severs it from the possession of the owner by refusing to return it, or by misappropriating it to his own use, or by applying it to purposes contrary to those for which it was entrusted to him by the owner.

READ: 4 Bl. Com., pp. 229–231;
Hawley, Criminal Law, pp. 191, 192, 198;
Desty, Criminal Law, §§ 145–145 *i*;
May, Law of Crimes, §§ 269, 277–287;
Clark and Marshall, Criminal Law, §§ 314–325;
Clark, Criminal Law (Tiffany Ed.), §§ 94–98;
Kenney, Criminal Law, pp. 175–186;
2 Russell on Crimes, pp. 121–209;

Archbold, Criminal Procedure, pp. 1174–1176, 1181–1185, 1194–1217;
2 Bishop, Criminal Law, §§ 794–839, 853–890;
Wharton, Criminal Law, §§ 914–931, 956–976;
McClain, Criminal Law, §§ 548–563.

§ 562. Of Larceny: the Property.

The property taken must, at the time it is taken, be *personal property*. Real property, and things permanently annexed thereto, are not subjects of theft. If portions of the realty are separated from the land and so are changed into personal property, and while in this condition pass into the possession of their owner though but for a moment, a subsequent severance of them with intent to steal will be a theft. But if the severance from the land and the removal are simultaneous, these acts do not deprive the owner of his personal property, because as personal property the objects taken never were in his possession. Thus where a wrongdoer plucks apples from a tree, and puts them in his pocket or in a bag held in his hand and not resting on the ground; or where he lifts a shutter from its fastenings and lays it on his shoulder to carry it away, — these acts are trespass and not theft. But if he shakes the apples from the tree and they fall upon the land, or leans the shutter against the building for an instant, the severed articles become personal property in the possession of their owner, and then to take and carry them away may be a larceny. Any objects recognized by the law as personal property, whether animate or inanimate, are capable of being stolen; but objects not so recognized, whatever be their value or importance to their owner, are not subjects of theft. No property is the subject of larceny unless it has some appreciable pecuniary value, however small; for the law does not undertake to protect, by so severe a penalty as theft receives, articles that are absolutely worthless.

Rem. *Choses in action*, commonly so called, being mere incorporeal rights, are incapable of severance from the possession of their owner by any form of taking and carrying away. But the written evidence of the existence of such rights — such as bills, notes, bonds, deeds, and similar instruments — are tangible property, and under the name of choses in action are generally by statute, if not by the unwritten law, placed on the same plane

with other chattels and made subject to theft. Although such instruments may have no intrinsic value, and the rights evidenced by them may be susceptible of other proof, it has been held that upon a prosecution for stealing them they should be estimated as of their face value.

READ: 4 Bl. Com., pp. 232–236;
Hawley, Criminal Law, pp. 198–200;
Desty, Criminal Law, §§ 145 *k*–145 *o*;
May, Law of Crimes, §§ 271–276;
Clark and Marshall, Criminal Law, §§ 303–312;
Kenney, Criminal Law, pp. 191–195;
2 Russell on Crimes, pp. 222–252;
Archbold, Criminal Procedure, pp. 1176–1181;
2 Bishop, Criminal Law, §§ 757–787;
Wharton, Criminal Law, §§ 862–882 *b*, 951–955;
McClain, Criminal Law, §§ 534–543.

§ 563. Of Larceny: the Ownership of the Property.

Ownership in larceny, as in many other crimes, signifies the legal right to immediate possession. This right resides in the ultimate owner of the property as against all persons except those upon whom some temporary right to possession has been legally conferred. In such persons, during that temporary period, this possessory right exists as against all the world. Thus where the ultimate owner has delivered the property to a *bailee*, the wrongful severance of the property by a stranger from the possession of the bailee is a severance also from that of the owner; while if the owner commits the act of severance as against the bailee he may be guilty of theft. *Joint tenants* and tenants in common have no ownership as against each other; nor has a husband any ownership as against his wife; and hence neither of these parties can steal the common property from one another. The ownership of *property which is attached*, or held under an execution before sale, is still in the general owner; and property in the hands of an *agent* belongs, as against third parties, to his principal. *Clothing* furnished by a parent to his children, while being worn by them, is the property both of the children and the parent.

Rem. The right to immediate possession is not defeated by the unlawful removal of the property by a trespasser or a thief. To steal from the thief or trespasser is to steal from the rightful

possessor; and since naked possession, although wrongful in its origin, gives a right to possession against all persons except those in whom the legal right to possession resides, the theft is also one against the thief or trespasser.

READ: 4 Bl. Com., p. 236;
Hawley, Criminal Law, pp. 200, 201;
Clark and Marshall, Criminal Law, § 313;
Kenney, Criminal Law, pp. 186–191;
2 Russell on Crimes, pp. 252–273;
Archbold, Criminal Procedure, pp. 1187–1194, 1218–1241;
2 Bishop, Criminal Law, §§ 788–793;
Wharton, Criminal Law, §§ 932–950;
McClain, Criminal Law, §§ 544–547.

§ 564. Of Larceny: the Intent to Steal.

In order to constitute a larceny the taking and carrying away must be accompanied by an intent to steal. The *intent to steal* always comprises an intent to permanently and wrongfully deprive the owner of the possession of the property. Thus a taking with an intention to return the property after using it, or a taking under a claim of right, or under a *bona fide* mistake as to the ownership of the property, are not theft but mere trespass or conversion. Whether any other intent than this is included in the intent to steal is disputed. The intent to steal must *coincide in point of time* with the act of taking, for an intent subsequently formed does not characterize the act nor raise it from a trespass to a crime. Thus one who having found lost goods, and not knowing the owner or having any apparent means of ascertaining his identity, *afterwards* determines to appropriate them to his own use, is not guilty of theft; though if he knew the owner, or might with reasonable effort have discovered him, the presumption that at the time of taking he intended to appropriate them becomes very strong, and unless rebutted may warrant his conviction for larceny. Where the law regards a finder as having only a mere custody of the property found, a subsequent appropriation to himself is a new taking with intent to steal. The intent to steal is a *specific intent*, a matter of fact and not of law, and must be proved by the prosecutor beyond reasonable doubt. A *secret taking* furnishes an inference of such intent, as an open and notorious taking does of an honest though mistaken purpose. The *con-*

scious exclusive possession of stolen property immediately after the theft raises the presumption that the possessor is the thief, and throws upon him the burden of explaining his possession, or of proving that he took it without intent to steal.

Rem. It is held by some authorities that the intent to steal must include an expectation and purpose of profit to the taker. Where this doctrine of *lucri causa* prevails it is not larceny to take the property in order to injure the owner by destroying it, while if the taker entertained any hope of benefiting himself by the taking, even in the most trivial degree, the conversion would be theft. Thus one who took and destroyed a letter belonging to another in order to prevent injury to his own reputation; one who killed another's cattle in order thereby to suppress evidence against himself; one who appropriated an article in order to present it to his mistress; one who, contrary to his instructions, fed his master's horses with a certain food belonging to his master in order to save himself the labor of preparing other foods; all these were alike held guilty of taking *lucri causa*, and therefore of intent to steal. The difficulty of proving this ingredient of the intent to steal, especially in cases where the thief is arrested before he has appropriated the property to his own use, has led many courts to reject the doctrine of *lucri causa* altogether, and to hold that a design unlawfully and permanently to dispossess the owner is a complete intent to steal.

READ: 4 Bl. Com., p. 232;
Hawley, Criminal Law, pp. 188–191, 193–197;
Desty, Criminal Law, §§ 145 *j*, 145 *w*;
May, Law of Crimes, §§ 288–291;
Clark and Marshall, Criminal Law, §§ 326–333;
Kenney, Criminal Law, pp. 195–208;
2 Russell on Crimes, pp. 209–222;
Archbold, Criminal Procedure, pp. 1185–1187;
2 Bishop, Criminal Law, §§ 840–852;
Wharton, Criminal Law, §§ 883–913;
McClain, Criminal Law, §§ 564–571.

§ 565. Of Robbery: the Larceny.

Robbery is the most heinous form of larceny. It consists in the theft of property from the person or in the presence of the owner, accomplished by violence or putting him in fear. The elements of the act of *theft* are identical in all respects with those of ordinary larceny. There must be the same wrongful taking and carrying away of personal property from the possession of

the owner, against his will and with the intent to steal. In robbery, however, the property must be taken *from the person or in the presence* of the owner. How far the limits of the person and presence extend it is not always easy to determine. They cover all personal property which is actually or physically connected with the body of the owner, and also all which is in his sight and is under his immediate and personal care and protection. Thus where a master's goods were stolen by violence from his servant in the master's presence; where a traveler was assaulted by a thief who then took away his horse which was standing by him; where the owner was forcibly confined in one room of his house while thieves pillaged the others; where a person, moved by fear, threw his purse by the wayside, and his assailants immediately and in his sight picked it up, — these thefts were held to be committed in the presence of the owner. On the other hand, property not actually in his sight nor under his control, however near to him it may be, is not in his presence. Thus where thieves struck money from the owner's hand and it fell upon the ground, whence they immediately picked it up, it not being proved that he saw them do so or that the money remained under his control, it was adjudged to be no robbery.

Rem. Larceny may be aggravated by various attendant circumstances. Thus where the property stolen is below a certain value fixed by law, it is called "*petit larceny*"; where it exceeds that value, the offence is "*grand larceny*." Larceny under ordinary conditions is known as "*simple larceny*"; where the theft takes place in a house or from the person it is "*compound larceny*." These distinctions relate principally to the kind and measure of the punishment to be inflicted for the crime. Robbery is one form of compound larceny.

READ: 4 Bl. Com., pp. 239–242;
Hawley, Criminal Law, pp. 233–235;
Desty, Criminal Law, §§ 142–142 *a*, 142 *g*, 142 *j*, 145 *p*–145 *w*;
May, Law of Crimes, §§ 245, 248, 270, 293–297;
Clark and Marshall, Criminal Law, §§ 334–340, 370–373;
Clark, Criminal Law (Tiffany Ed.), §§ 105–107;
Kenney, Criminal Law, pp. 209–216;
2 Russell on Crimes, pp. 80–87;
Archbold, Criminal Procedure, pp. 1287–1289;
2 Bishop, Criminal Law, §§ 892–904, 1156–1165;
Wharton, Criminal Law, §§ 846–849;
McClain, Criminal Law, §§ 468, 471–479, 574–620.

§ 566. Of Robbery: the Violence or Putting in Fear.

A larceny is not robbery unless the severance of the property from the possession of the owner is effected by violence or by putting him in fear. Where the larceny is accomplished by *violence*, the violence must be some exercise of physical force, distinct from or in excess of that which is involved in the act of taking. It must amount to an assault upon the person of the owner, and not be merely an attack upon his property. Thus where an article is snatched from the owner's hand, or is stealthily extracted from his pocket, it is a *stealing from the person*, not a robbery. But where the article is attached to a chain around his neck so that the snatching it applies force to his person, or if there be a struggle for its possession before the taking, there is sufficient violence to make the theft a robbery. To *put in fear* is to excite, by threats or actions which manifest an intent to commit violence, a reasonable apprehension in the mind of the owner that physical injury will be inflicted on him or on some person under his protection, or that he will be prosecuted for the crime of sodomy, unless he surrenders his property to the thief. In this form of robbery the property must be delivered up by the owner while he is under the influence of such apprehension, though it need not be at the same time the threats were made against him. Thus where a thief compelled his victim to swear that he would bring a sum of money to him at a certain place, and threatened him with death if he failed to do so, the surrender of the money at that place at a subsequent date, yet under the fear of death, was held to be a robbery. So where, under fear of a threatened prosecution for the crime of sodomy, a man promised to pay money and afterwards, under the influence of the same fear the money was actually paid, the taking of the money was adjudged a robbery.

Rem. In this crime the violence or the putting in fear must, in all cases, either precede or accompany the act of taking. A personal injury inflicted after the taking is completed does not change the character of the theft, though it may constitute a separate crime.

READ: 4 Bl. Com., pp. 242, 243;
Hawley, Criminal Law, pp. 235–237;
Desty, Criminal Law, §§ 142 *b*–142 *e*;

May, Law of Crimes, §§ 246, 247;
Clark and Marshall, Criminal Law, §§ 374–379;
2 Russell on Crimes, pp. 87–112;
Archbold, Criminal Procedure, pp. 1289–1306;
2 Bishop, Criminal Law, §§ 1166–1181, 1200, 1201;
Wharton, Criminal Law, §§ 850–858;
McClain, Criminal Law, §§ 469, 728–738.

§ 567. Of Embezzlement.

Larceny is committed only when the property is taken from the possession of the owner by a person who, at the time, has no possession. The wrongful appropriation of property by one who already has possession is sometimes made a crime by statute under the name of *embezzlement*. In order to comprehend the nature of this crime the distinctions between custody, possession, and ownership must be kept in mind. The custody of an object may reside in one person, the right of immediate possession in another person, the right of future possession in a third, and the ultimate ownership in a fourth. Larceny is always a violation of the right of *immediate possession*, and may be committed, as has been already explained, either by a stranger or by a person to whom the custody of the property has been delivered. The violation of the right of future possession by a person in whom resides the right of immediate possession, and the violation of the ultimate right of ownership by any person, are not larceny; though where the right of immediate possession terminates, and the possessor still retains control of the property, his control becomes mere custody, and his subsequent violation of the former right of future possession, which has now changed into a right of immediate possession, will be a theft. *Embezzlement* embraces only violations of the right of future possession by a person who still has the right of immediate possession. But it does not include all such violations. The ordinary wrongs committed by bailees against bailors, and by debtors against creditors, are left by the law to such redress as civil remedies supply. The rules defining and punishing embezzlement cover those cases where some *special fiduciary relation* exists between the immediate and the future possessors which is necessitated by the ordinary course of business, and where the wrongful act of the immediate possessor, subverting the right of the

future possessor, involves a breach of personal confidence and trust. Thus when a master entrusts a servant with the collection of his bills from third parties, the money paid by the third parties to the servant vests in the immediate possession of the servant, — not in his custody, because custody presupposes a possession by the master before delivery to the servant; and therefore, if the servant converts the money to his own use, while it is still in his possession, his conversion is not larceny but embezzlement. On the contrary, if the servant delivers the money into the actual or constructive possession of the master, as by placing it in the master's till or safe, his own possession ceases, and if he afterwards takes it out and converts it the conversion is a theft.

Rem. The statutes defining embezzlement generally specify the fiduciary relations of which this crime must be the violation; including among them the officers of public and private corporations, and the clerks, agents, and servants of any natural or artificial person. These statutes also describe the criminal act in terms sufficient to embrace all fraudulent conversions, by such subordinates, of any personal property received by them on behalf of their employers. Minor details of the crime differ under the different local laws.

READ: Hawley, Criminal Law, pp. 202–212;
Desty, Criminal Law, §§ 146–146 *l*;
May, Law of Crimes, §§ 298–304;
Clark and Marshall, Criminal Law, §§ 341–349;
Clark, Criminal Law (Tiffany Ed.), §§ 99, 100;
Kenney, Criminal Law, pp. 217–226;
Archbold, Criminal Procedure, pp. 1336–1357;
2 Bishop, Criminal Law, §§ 318–383;
Wharton, Criminal Law, §§ 1009–1064;
McClain, Criminal Law, §§ 621–656.

§ 568. Of False Pretences.

The law of *larceny* provides for the punishment of the wrongful severance of personal property from the possession of the owner against his will; whether it be by strangers, or by persons in whose custody the property has been placed by the owner, or by persons in whose custody the property remains after their temporary rightful possession has expired, or by persons who have obtained its custody by fraud or deceit. The law of *em-*

bezzlement provides for cases of wrongful conversion by persons upon whom the owner has voluntarily and intelligently conferred a temporary possession, so far as the State deems it expedient to treat such conversions as crimes. There remain the wrongs committed by persons who *fraudulently obtain*, with the owner's consent, either the temporary possession of personal property, or its permanent possession, or its ultimate title and ownership. With these the list of possible injuries, which deprive the owner of his property, becomes complete. The wrongs inflicted by those who fraudulently acquire a temporary possession of the property demand no specific public interference. The consent of the owner of the property to its possession is revocable at his pleasure; the possession of the wrongdoer then becomes mere custody, and his subsequent appropriation of it will be theft. But to procure by fraud the permanent possession or the ownership is made criminal by statute, and is known as *false pretences*. A false pretence consists of any false representation concerning past or existing facts, which the representer knows to be untrue, and which he makes for the purpose of inducing the owner to part with his property. When such a representation, being in good faith and with due caution accepted and relied on by the owner of the property, influences him, either alone or in connection with other circumstances, to transfer the property to other persons to his own injury, the crime of false pretences is committed. The *representation* may be made by words or signs or any other method of conveying information. It must relate, in part at least to *past or existing facts* and not merely to future acts or conditions, since no man can act with due care if he relies wholly on the promises or prophecies of others; but though it be in form a prophecy or promise, yet if it necessarily implies past or existing facts, it will be an assertion of those facts and a sufficient representation. The facts falsely alleged must be of such a character that the owner of the property, while acting with ordinary prudence, might have been induced by them to transfer it, and must have been so far the moving cause of his decision that but for them and their effect upon his mind the property would not have been transferred.

Rem. Whether the transfer of the property affects its permanent possession or its ownership is immaterial as to this crime. The wrong done in either case is practically the same. In reference to the title which the representer acquires in the property, the rights he could confer on others, and the civil remedy of the true owner against him, the distinction may be important, and would depend on the intention of the owner as expressed in the contract by which the transfer was effected.

READ: Hawley, Criminal Law, pp. 197, 201, 202, 212–224;
Desty, Criminal Law, §§ 149–149 *i*;
May, Law of Crimes, §§ 305–317;
Clark and Marshall, Criminal Law, §§ 355–369;
Clark, Criminal Law (Tiffany Ed.), §§ 103, 104;
Kenney, Criminal Law, pp. 227–237;
Archbold, Criminal Procedure, pp. 1376–1412;
2 Bishop, Criminal Law, §§ 409–488;
Wharton, Criminal Law, §§ 1130–1235;
McClain, Criminal Law, §§ 657–659, 665–710.

§ 569. Of Forgery.

Forgery is the false and fraudulent making or alteration of any writing which upon its face imports a legal obligation. Any *form of instrument* by which one person can become obligated to another, whether to pay money, render service, forego a right, or respond in damages is a writing subject to forgery. Any *alteration* in such an instrument, in any particular whereby its legal effect is varied, is a sufficient alteration to constitute a forgery. An *alteration is false* when made by any person who has no right to make it; and is *fraudulent* when made with intent that the false instrument shall be used or received as valid. No intent to defraud any specific person is necessary; a purpose to inflict a loss upon the pretended maker of the instrument, or upon its receiver, or upon some third party to whom it relates, or even upon unknown parties into whose hands it may come or whom it may mislead, brings the act within the prohibitions of the law. The *forgery is completed* by the making or alteration of the instrument with intent to defraud, although it may never be used and no one may be actually defrauded.

Rem. *Uttering a forged* instrument is an offence distinct from that of its preparation. It consists in the act of offering or delivering to another an instrument, known to the utterer to be forged, for the purpose of defrauding the recipient or some other

person to whom it may be transferred by him. The utterer may be a different person from the forger, and may have himself innocently received the instrument, — as by finding it, or taking it in the ordinary course of business. The uttering is complete when the instrument has been so presented to the other person as to have been likely to deceive him, whether he accepts it or not, and even though the utterer does not intend to surrender its possession, — as in the case of a forged receipt exhibited to a creditor in answer to his demand for the payment of a bill. If the instrument on its face purports to create a valid legal obligation, the mere offer of it is sufficient; if explanations or affirmations are necessary to make the recipient comprehend its nature, and rely upon its genuineness, these must accompany the offer in order to constitute an uttering. At this point the crime borders upon that of false pretences which can be committed by means of writings which are not subjects of forgery, and by uses of forged papers which do not amount to uttering.

READ: 4 Bl. Com., pp. 247–249;
Hawley, Criminal Law, pp. 225–233;
Desty, Criminal Law, §§ 150–150 *q*;
May, Law of Crimes, §§ 329–335;
Clark and Marshall, Criminal Law, §§ 392–399;
Clark, Criminal Law (Tiffany Ed.), §§ 111–114;
Kenney, Criminal Law, pp. 240–247;
2 Russell on Crimes, pp. 564–641;
Archbold, Criminal Procedure, pp. 1563–1640;
2 Bishop, Criminal Law, §§ 521–612;
Wharton, Criminal Law, §§ 653–747;
McClain, Criminal Law, §§ 743–773.

§ 570. Of Counterfeiting.

Counterfeiting, properly so called, is the fraudulent making of false coin in the similitude of the genuine. The name as well as the crime is now extended to embrace the false making of paper money, official stamps, and other tokens issued by the State and having general circulation among the citizens. Counterfeiting contains an element of treason, and was enumerated as such among the seven treasons of the 25 Edw. III (A.D. 1350). The use of counterfeit money in order to defraud is one species of cheating, and is a crime against public trade. In some of its phases it is also an offence against the property of individuals. Many of its forms, such as the making of false bank notes, and other tokens importing a legal obligation, contain all the ingredients of forgery. The principal difference between forgery

and counterfeiting resides in the fact that the subjects of counterfeiting are intended and used for general circulation among the people, by whom they are taken, without close examination, for what they appear to be; while an instrument, whatever may be its appearance, is not the subject of forgery unless it imports a legal obligation. Hence to impose upon the public, which judges only by appearances, the counterfeit must have the similitude of the genuine in such particulars as will cause it to be taken for the genuine, and yet need correspond with it no more closely than may be sufficient to deceive the public as it circulates among them. The crime is completed by the making of the false coin or token for a fraudulent purpose, though no attempt may be made to use it.

Rem. *Uttering counterfeit coins* or tokens is a distinct crime from the making, and can be committed by one who took the coin or token in good faith if, after discovering its true character, he endeavors to pass it off to others.

READ: Desty, Criminal Law, §§ 151–151 *d*;
May, Law of Crimes, § 336;
1 Russell on Crimes, pp. 207–248;
Archbold, Criminal Procedure, pp. 1669–1676;
2 Bishop, Criminal Law, §§ 274–300;
Wharton, Criminal Law, §§ 748–755;
McClain, Criminal Law, §§ 774–810.

§ 571. Of Malicious Mischief.

Malicious mischief is the wilful and malicious injury or destruction of the property of another. Any property, real or personal, may be the subject of this crime; the particular kinds of property and the specific acts of injury being generally defined by local statutes. In order to be *malicious* the mischief must be wilful as distinguished from accidental; must be wrongful as distinguished from lawful, which such an injury may be in defence of property or person; and must be prompted by a spirit of ill-will or resentment against the owner or possessor of the property.

Rem. Akin to this crime, and often passing under the same name, are numerous injuries to public and private property, committed without malice toward any person but in sheer wan-

tonness, and with an unconscious disregard of the owner's right, — such as the defacing of public monuments, despoiling cemeteries or parks, or cutting or plucking plants on private premises. The tendency to elevate mere private torts into crimes in this direction is very marked, and may be justified by the necessity for such protection in view of the uncertainty, expense, and delay attending the pursuit of private remedies.

READ: 4 Bl. Com., pp. 243–247;
Desty, Criminal Law, §§ 144–144 *f*;
May, Law of Crimes, §§ 321–323;
Clark and Marshall, Criminal Law, §§ 388–391, 429;
Clark, Criminal Law (Tiffany Ed.), § 110;
Kenney, Criminal Law, pp. 161–164;
Archbold, Criminal Procedure, pp. 1469–1562;
2 Bishop, Criminal Law, §§ 983–1000;
Bishop, Statutory Crimes, §§ 430–449;
Wharton, Criminal Law, §§ 1065–1082 *d*;
McClain, Criminal Law, §§ 811–835, 1161–1168.

§ 572. Of Piracy.

Piracy is not only a crime against the law of nations, and punishable by any State into whose custody the pirate may be brought, but it is also frequently extended by local laws beyond its international definition, and made to cover a variety of other depredations upon navigable waters and their shores. Jurisdiction over such locally defined offences vests exclusively in the State by which they are prohibited, and affects only those guilty persons who are subjects of that State or of no State whatever, or who have committed the offence upon the vessels or in the territory belonging to that State.

Rem. When injuries prohibited by local laws are perpetrated by subjects of a foreign State, upon a foreign vessel, the laws and courts of that foreign State alone have jurisdiction over them.

READ: May, Law of Crimes, §§ 338, 339;
Kenney, Criminal Law, pp. 304–307.

SECTION V

OF IMPERFECT CRIMES

§ 573. Of Perfect and Imperfect Crimes.

A wrong when completed comprises both a cause and a consequence, — a cause consisting of some action or omission

prohibited by law; a consequence proximately and naturally arising from that cause, and injuriously affecting or liable to affect public or private rights. A crime, being a wrong, is not perfect unless it includes a consequence which is actually or potentially injurious without farther action or omission on the part of the offender. This is manifest even in such crimes as forgery and counterfeiting where, though no one may have been defrauded, the false instruments or tokens have within themselves the power of mischief without additional assistance from their maker. A crime from which no consequence can yet result is, therefore, an *imperfect crime*. If it consists of physical actions which produce no injurious effects, it is then called an *attempt*. If it stops short of actions and is a mere agreement with others to commit a wrong, it is then known as a *conspiracy*. If it is a mere manifestation of desire that some other person should perpetrate a wrong it receives the name of a *solicitation*.

Rem. That these imperfect wrongs should be regarded as crimes, and be forbidden by the law, is justified by the fact that it is the duty of the State to prevent as well as punish crimes, and thus to interrupt, as far as possible, the course of intended wrong.

READ: Wharton, Criminal Law, §§ 152–169;
McClain, Criminal Law, § 219.

§ 574. Of Attempts.

An *attempt* consists in the intent to commit a crime combined with the performance of some act adapted to, but falling short of, its actual commission. The act performed must bear toward the intended crime a causal relation, either actual or apparent, and must not consist in mere preparations to commit it, — a distinction not always easy to apply in practical cases, nor clear to the judicial mind, as is evident from such conflicting decisions as those which hold that to procure a gun to kill a neighbor was only preparation, but to obtain a false key to unlock a door was an attempt. It is not necessary that the act performed perfect the causal chain, leaving the consequences to follow unless interrupted by extrinsic circumstances; it is sufficient if one act of the causal series be committed with

intent to follow it with others till the series is complete. Thus the insertion of a false key into the lock of a dwelling-house door, in the night season, with the intent then and there to enter and commit a felony is an attempt to perpetrate a burglary although the key is not yet turned, nor the door unlocked nor opened.

Rem. In order to comprehend the true character of an attempt as an imperfect crime it is necessary to distinguish it both from cases where the act performed, though innocent in itself, accomplishes the injurious result intended and thereby becomes a perfect crime, and from cases where the act performed is in itself a crime irrespective of its intention, but becomes aggravated by the unfulfilled specific intent with which it was committed. These latter cases, such as assaults with intent to rob or kill, are often called attempts, and this they truly are in reference to their intended but unattained result; but considered in themselves they are complete in cause and consequence and hence are perfect crimes. An attempt, as an *imperfect crime*, is an act which is not criminal in itself, nor followed by consequences which make it criminal, but is made criminal by law because performed with an intent thereby to perpetrate or to aid in perpetrating a perfect crime. In reference to attempts a most important question frequently arises; namely, whether a person can attempt a crime which, under the circumstances, he is unable to commit? To answer this question properly it must be divided, and applied separately to each of the two elements of which an attempt is composed. *Firstly*, then can a person intend an impossible result? Undoubtedly he can, provided he does not know that it is impossible. *Secondly*, can there be a true causal relation between an act and a result which it cannot possibly accomplish? Certainly not, for wherever a true causal relation exists the effect is potentially present in the cause, and the operation of the cause must produce the effect unless extrinsic forces interfere. Hence, if the act which constitutes a part of the alleged attempt cannot, from the very nature of the case, be followed by the consequences intended by the actor, the actor is not guilty of an attempt. To prevent the escape of an intending criminal, on the ground that the result he had in view was unattainable, some courts have held that an *apparent* causal relation between the act performed and the intended result would be sufficient to make the act an attempt. But this doctrine is of doubtful validity. For since the actor would never have performed the act if he had known that no true causal relation existed between his act and the intended crime, and since he could not have intended what he knew to be

impossible, and since the act is innocent apart from the intent, his sole guilt consists in a mental error, — in falsely supposing that an action itself innocent would accomplish an unattainable result, which if it could have been accomplished would have been a crime. To treat this mental error as a criminal offence is to punish him for a mere operation of his mind and will. A sounder judgment is exhibited by those tribunals which adhere rigidly to the distinction between the perfect crimes which are aggravated by their combination with a specific intent thereby to perpetrate a greater crime; those actions or omissions which not being criminal in themselves become imperfect crimes through their true causal relation to an intended criminal result; and those which, though performed in the vain hope of perpetrating a mischief which is inherently impossible, are neither criminal in themselves nor are made criminal by the mistaken opinion of the actor concerning their relation to a criminal result.

READ: Clark, Elementary Law, § 91;
Hawley, Criminal Law, pp. 90–96;
Desty, Criminal Law, §§ 12–12 *b*;
May, Law of Crimes, §§ 18, 183–184 *a*;
Clark and Marshall, Criminal Law, §§ 119–129;
Clark, Criminal Law (Tiffany Ed.), §§ 55, 56;
Kenney, Criminal Law, pp. 72–76;
1 Russell on Crimes, pp. 195–199;
Archbold, Criminal Procedure, pp. 79, 896–898;
1 Bishop, Criminal Law, §§ 723–772 *a*;
Wharton, Criminal Law, §§ 173–200;
McClain, Criminal Law, §§ 221–229.

§ 575. Of Conspiracy.

Conspiracy is the agreement of two or more persons to injure a third person or the public by doing some unlawful act, or by doing some lawful act in an unlawful manner. A conspiracy cannot be committed by one person alone, nor by husband and wife alone because they are legally a single person. Nor is an agreement by two or more persons to perform an act which affects only themselves a conspiracy, — such as to commit adultery or engage in an affray; the combined injurious force must be directed against parties outside the conspiracy. Between the conspirators there must be a concert of will and endeavor, not a mere coincidence of intention or attempt. The act which forms the subject of the agreement may be in itself a crime; or it may be a tort whose injurious effects

will be aggravated when inflicted by a multitude; or it may be an act not wrongful in itself but to be performed in a forbidden manner or degree or for a malicious purpose; or it may be an act which, though lawful in itself and in its method, will become vexatious and injurious if committed at the same time by many persons. Examples of these acts are found in conspiracies to extort money, to injure reputation, to cheat and defraud, to suppress competition in trade, to exclude others from employment, or to destroy domestic peace; although the acts performed are in themselves innocent, their methods reasonable, and their consequences when committed by a single individual not sufficiently injurious to require the interference of the law.

Rem. The practical distinction between a lawful combination and a conspiracy lies in the scope and purpose of the agreement. Any number of persons may in good faith combine for their own protection and advancement, if they perform no acts which are unlawful either in their substance or their method, although the indirect result of the combination may be prejudicial to others. But they must not combine with a malicious intent to produce that indirect result through the same lawful acts, nor purposely employ their combined energies against the public, nor against the persons or property of their unoffending neighbors. Where a conspiracy exists it is a complete although an imperfect crime, without the commission of any overt act in pursuance of the agreement, unless the local law makes such an act a necessary ingredient of the crime. If the agreement be to perpetrate a felony, and the felony is committed, the conspiracy is merged in the felony, which then becomes the act of each and all the parties to the agreement unless they openly retracted before the felony was commenced.

READ: 4 Bl. Com., pp. 136, 137;
Hawley, Criminal Law, pp. 99–115;
Desty, Criminal Law, §§ 11–11 *h*;
May, Law of Crimes, §§ 186–191;
Clark and Marshall, Criminal Law, §§ 134–149;
Clark, Criminal Law (Tiffany Ed.), §§ 58–60;
Kenney, Criminal Law, pp. 273–279;
1 Russell on Crimes, pp. 501–552;
Archbold, Criminal Procedure, pp. 1829–1847;
2 Bishop, Criminal Law, §§ 169–240;
Wharton, Criminal Law, §§ 1337–1407;
McClain, Criminal Law, §§ 952–990.

§ 576. Of Solicitation.

Solicitation is the inciting or persuading of another to commit a felony, or other heinous crime. The solicitation is complete though the person solicited refuse; but if he consents and acts on the solicitation the solicitor becomes a party to his crime. If the crime is undertaken, and is not accomplished, the solicitor would be a participator in the attempt.

Rem. Where the crime is a felony, and is committed in response to the solicitation, the solicitor is an accessary before the fact. If the crime is a misdemeanor and the solicitor is noticed at all by the law, he is treated as a principal, and guilty of the crime itself.

READ: Desty, Criminal Law, § 12 *c*;
May, Law of Crimes, §§ 19, 185;
Clark and Marshall, Criminal Law, §§ 130–133;
Clark, Criminal Law (Tiffany Ed.) § 57;
McClain, Criminal Law, § 220.

PART II — OF CRIMINAL PROCEDURE

§ 577. Of the Prosecution and Punishment of Crime.

Crimes are punished by the State in various methods, some with and some without formal legal proceedings. Instances of punishment without formal legal proceedings are found in the confiscation of smuggled goods; in the destruction of public nuisances; in removals from office for violation of duty; in the infliction of penalties for contempt; and in many other summary acts of executive or judicial bodies. In general, when criminal procedure is discussed reference is made only to public prosecution in the criminal courts; all other proceedings being exceptional and occasional, however numerous they may be. To these courts, and their methods of pursuing and punishing crime, the present explanations will therefore be confined.

Rem. Besides the ancient and more formidable processes of a regularly constituted criminal court crimes are sometimes prosecuted in *qui tam* actions, in which an informer sues for the penalty on his own behalf as well as on that of the State; or in suits for penalties in some special statutory method as provided by the local law; or in prosecutions under municipal by-laws. None of these proceedings supersede the ordinary prosecutions instituted by the State in its own name, or prevent the offender from being subsequently tried and punished in the criminal courts.

READ: 3 Bl. Com., pp. 159, 160;
4 Bl. Com., pp. 280–288;
Wharton, Criminal Pleading, §§ 947–975;
Clark, Criminal Procedure, Introduction;
Abbott, Criminal Brief, pp. 13–15;
Hochheimer, Crimes and Criminal Procedure, §§ 62, 206–208.

CHAPTER I

OF CRIMINAL COURTS AND THEIR JURISDICTION

§ 578. Of Criminal Courts.

A *criminal court* is a tribunal established by the State for the trial and judgment of persons accused of crime. It is *composed* of a judge, a clerk, and a sheriff; to whom may be added a jury. It also embraces a *prosecuting officer* whose duty it is to inquire into cases of suspected crime, and present them, with the evidence as to their commission, to the judge and jury for their examination and decision. This officer is not, as might often be supposed from his actual conduct, a partisan of the State against the accused, commissioned to secure his conviction by all available means; but a minister of public justice who, on behalf of the State, endeavors to lead the judge and jury to a correct conclusion, and is therefore bound to disclose to them the circumstances favorable to the prisoner as well as those which militate against him. The other members of the tribunal have the same functions as in civil courts.

Rem. In criminal courts preventive as well as punitive remedies may be applied, though naturally the former are of rare occurrence since crime is not ordinarily anticipated before its commission. These *preventive remedies* in many points resemble injunctions issuing out of courts of equity. They consist in compelling the person, whose criminal purposes are reasonably demonstrated by his preparations, threats, or general conduct, to enter into a *recognizance* with sureties before a proper court, pledging him under suitable penalties to *keep the peace,* and to refrain from the commission of the anticipated crime. *Punitive remedies,* on the other hand, follow the general outline of the proceedings in the courts of common law. To the writ corresponds the warrant; to the service of process, the arrest, commitment, and bail; to the declaration, the indictment, information, or complaint; to the pleadings, the arraignment, plea, and issue; thence alike in both tribunals, the trial, verdict, judgment or sentence, writ of error and final execution.

READ: 4 Bl. Com., pp. 251–257, 289;
May, Law of Crimes, §§ 87–132;
Wharton, Criminal Pleading, §§ 554–556;
Rapalje, Criminal Procedure, §§ 1–6, 212–213;
1 Bishop, Criminal Procedure, §§ 26–44, 278–294;
Hochheimer, Crimes and Criminal Procedure, § 89;
Rice, Criminal Evidence, § 219 *e*.

§ 579. Of the Jurisdiction of Criminal Courts.

Criminal jurisdiction is the authority to investigate and determine the guilt or innocence of persons accused of crime, and to punish them when found guilty. It includes jurisdiction over the person of the accused, and over the offence with which he is charged. *Jurisdiction over the person* of the accused is acquired by his lawful arrest, and his presentation at the bar of the court to answer for the crime. That his arrest was accomplished by violence, or by an artifice which brought him within reach of process, if it was otherwise lawful, does not prevent the court from obtaining jurisdiction over him, whatever private remedy he may have against the persons by whom he was entrapped or confined. *Jurisdiction over the offence* is conferred upon the court by express legislation, and depends either (1) Upon the locality where the crime was committed; or (2) Upon the nature of the crime itself; or (3) Upon the character or degree of the penalty which the law imposes on the offender.

Rem. Jurisdiction over the person of the accused can be conferred not only by his lawful arrest, but by his voluntary appearance in court and submission to its authority. Jurisdiction over the offence cannot be created by his consent, but only by complete compliance with all the conditions prescribed by law.

READ: Clark, Criminal Procedure, §§ 1, 2, 21;
May, Law of Crimes, §§ 77–83;
Clark and Marshall, Criminal Law, §§ 486–492;
Hawley, Interstate Extradition, pp. 96–99;
1 Bishop, Criminal Law, §§ 99–203;
1 Bishop, Criminal Procedure, §§ 314–316;
Hochheimer, Crimes and Criminal Procedure, § 68.

§ 580. Of the Jurisdiction of Criminal Courts as Dependent on the Locality of the Crime.

The jurisdiction of a criminal court is derived from that of the State by which the court was established, and when de-

pendent on locality the crime must have been committed within the area to which the authority of the State extends. The *locality of a crime* is that particular subdivision of the State, or of the United States, in which the criminal act was performed. Where the wrongful action or omission and its proximate injurious consequences occur in the same territorial subdivision, the criminal act is there begun and completed, and no doubt can exist as to the locality of the crime. But where the wrongful action or omission takes place in one subdivision, and its proximate consequences arise in another, the crime as a whole is perpetrated in neither, and the question is presented whether either or both or neither is the place of the crime. This question has received various answers. Thus in a homicide where the blow was given in one county, and the death occurred in another, it has been held by some authorities that the slayer committed homicide in neither county; by others, that the county where the blow was given was the place of the crime; by others, that the locality of the crime was that of the death. Logically, where definite consequences must follow from the act in order that the act may constitute a crime as the law prohibits it, the crime is not committed till the consequences have been produced, and the place where they are produced is the locality of the perfected crime. This doctrine is recognized in the decisions which hold that the crimes of false pretences, robbery, and embezzlement are perpetrated in the county where the property is obtained or appropriated, and not in that where the pretences are made or the violence offered or the possession of the goods entrusted to the agent. But when the legal definition of the crime is satisfied by the performance of the act in such a manner that its proximate consequences may follow, whether or not they ever do occur, the crime is complete where the act is committed, and that place, therefore, is the place of the crime. This rule is adopted in forgery, where the locality of the crime is the place where the writing was falsely made or altered; in libel, where the place of publication is the place of crime; in bigamy, which is perfected where the second marriage is performed; and in the use of the postal service for improper purposes, whose locality is the place at which the letter has been mailed. To meet the difficulties sometimes arising in the settlement of this

disputed question local statutes or decisions recognize the right of the State to prosecute and punish the offence in either county. Another question is presented where the act commences in one territorial subdivision and continues in another, in which also it finally becomes a completed crime. The general answer to this question is that the latter subdivision is the true locality of the completed crime, though the former is the place of an attempt. Thus one who shoots at another across the boundary of two adjoining States is, if he kills the intended victim, guilty of the homicide in the State where the ball takes effect; if he misses, he is guilty in both States of an attempt to kill. A third question is presented when two or more persons conspire in one locality to commit a crime in another, and in pursuance of their agreement the crime is there completed by one of them in the absence of the others. In this case it is held that all are guilty of the conspiracy in the first locality, and of the overt act in the second. A fourth question relates to cases in which a guilty party in one locality commits a criminal act in another through the agency of an innocent person. Here, though the guilty party may never have been physically present in the locality of the completed crime, he is regarded as having been legally present, and his crime as having been there committed. A fifth question arises in reference to continuing crimes which are complete in each of several successive localities, — as where a thief carries the stolen property into different counties, or a nuisance spreads its baleful influence into various jurisdictions. In each of these successive places it is usually considered that a new crime is committed which may there be punished, as if it had no antecedent locality. Upon all these questions, pertaining as they do to technical limitations of judicial authority rather than to the guilt or innocence of the accused, the modern tendency is to remove obstacles to justice by allowing a wide latitude to public prosecutors; and permitting them to institute proceedings, either in the locality where the overt criminal act is commenced, or where it is continued or completed, or where its proximate consequence results. This tendency is particularly manifested by statutes which provide that where a crime is perpetrated so near the boundary line of two localities that it is difficult to prove in which it actually occurred, its perpetrator may be tried and

punished in the courts of either, if jurisdiction over his person can be obtained.

Rem. The criminal jurisdiction of the Federal courts of the United States covers all crimes against the laws of the United States which are perpetrated within its territory, or on board vessels sailing under its flag, or by its citizens in foreign countries. The territory of the United States where it abuts upon the ocean embraces the adjacent seas to the distance of a cannon shot from shore; where it abuts upon the territory of other nations the boundary is fixed by treaty. The criminal jurisdiction of the Federal courts is distributed between the Circuit Courts, the District Courts, and the Commissioners. The Circuit Courts have exclusive jurisdiction over all capital offences, and concurrent jurisdiction with the District Courts over all other crimes against the laws of the United States which are committed within their respective circuits. The District Courts have jurisdiction over all offences less than capital against the laws of the United States which are committed within their respective districts or which, having been perpetrated outside the limits of all the districts, are prosecuted within the district into which the offender is first taken after his arrest. The Commissioners, who in their official rank and functions resemble justices of the peace, have jurisdiction over preliminary criminal proceedings. Appellate jurisdiction is lodged in the Circuit Court of Appeals, and over the most important cases in the Supreme Court of the United States. The criminal jurisdiction of the different States of the American Union is coterminous with their political boundaries, except with reference to certain acts against the State by its own subjects outside its territory, such as adhering to its enemies or embezzling its funds. The territorial limits of these States where they lie upon the national borders of the United States, coincide with its external boundaries; where they abut on other States they are defined by colonial charters or by subsequent conventions, or by the Acts of Congress admitting the several States into the Union. Their principal criminal tribunals are the courts of Justices of the Peace, the Police Courts, the County Courts, and a higher Court of Appeals. Justices of the Peace and Police Courts are inferior judicial functionaries charged with the prosecution and punishment of inferior offences occurring within their respective towns, cities, or districts, and with the preliminary proceedings in reference to more grievous crimes. The County Courts, under various names and divisions, have original jurisdiction over the crimes committed within their respective counties, and usually an appellate jurisdiction over convictions in the inferior tribunals of the towns and cities comprised within the county.

Courts of Appeals, also of different degrees and designations, are courts of last resort for the determination upon error or appeal of questions of law arising in the cases prosecuted in the lower courts. Thus every territorial subdivision in the States and the United States has its own local courts, in which proceedings growing out of crimes committed in that particular locality must be conducted; their place of prosecution being technically known as the *venue*, and always corresponding with the locality of the crime.

READ: Archbold, Criminal Procedure, pp. 780–784;
Clark, Criminal Procedure, § 3;
Hawley, Criminal Law, pp. 66–76;
Clark and Marshall, Criminal Law, §§ 493–511½;
Clark, Criminal Law (Tiffany Ed.), §§ 165–168;
Wharton, Criminal Law, §§ 252–295;
1 Bishop, Criminal Procedure, §§ 45–67;
Hochheimer, Crimes and Criminal Procedure, § 53.

§ 581. Of the Jurisdiction of Criminal Courts as Dependent on the Nature or Punishment of the Crime.

Jurisdiction is conferred upon criminal courts either by the constitutions or the statutes of the States from which they derive their powers, and in these instruments various limitations are prescribed within which such courts are to exercise their judicial authority. A primary distinction is here drawn between the Federal and State courts by an Act of Congress which bestows exclusive jurisdiction on the Federal courts over all offences made punishable by the laws of the United States. All these offences are defined and prohibited by the Federal Constitution, or the treaties and statutes made under its authority, since the United States, as a nation, has no unwritten substantive criminal law. What actions or omissions can thus be made crimes by Federal legislation depends upon their relation to the national welfare. Within the limits of its sovereignty, external and internal, the United States has power to forbid any conduct prejudicial to its national interests or to the protection which it owes its citizens. Outside these limits it has no authority to clothe any wrongful action or omission with the character of crime. On the same principle, the State courts have exclusive jurisdiction over all crimes committed against their written or unwritten laws. Each State has authority to prohibit and punish any action or omission injurious to its sovereignty or the welfare of its

citizens, although the same action or omission may be made a crime, on other grounds, by Federal legislation; and in such cases the action or omission is, in law, two separate crimes, one of which may be prosecuted in the Federal courts, the other in the State tribunals. Wrongful actions or omissions, whose harmful consequences to the sovereignty of the State or to its citizens cannot be separated from those inflicted on the United States and on its people at large, may also be forbidden by the State, and its penalties may be enforced against offenders until the Federal government has taken such offences under its exclusive jurisdiction by making them crimes against the laws of the United States. Subject to the foregoing distinctions the States and the United States distribute criminal jurisdiction among their respective courts according to the enormity of the offences and the severity of their punishment; reserving the most heinous crimes for the cognizance of the higher courts, and entrusting those of inferior degree to the judgment of the lower tribunals. The local statutes which control this distribution are subject to frequent change.

Rem. Although the United States, as a nation, has no unwritten substantive criminal law, since all its acts defining and prohibiting crimes necessarily take the form of statutes, treaties, or constitutional provisions, yet its courts make constant use of the unwritten criminal law in interpreting the express enactments of the written, and in their procedure follow in many details the rules of the unwritten adjective criminal law.

READ: Hawley, Criminal Law, pp. 46–55;
Clark and Marshall, Criminal Law, §§ 512–514;
Clark, Criminal Law (Tiffany Ed.), §§ 162–164, 169, 170, 171;
Clark, Criminal Procedure, §§ 1, 2;
Hochheimer, Crimes and Criminal Procedure, §§ 54–56.

§ 582. Of the Jurisdiction of Criminal Courts over the Person of the Accused.

Over certain persons within their borders neither the States nor the United States possess criminal jurisdiction. These are visiting friendly sovereigns and their attendants; foreign ministers and diplomatic agents with their servants; friendly armies passing through their territory; and invading enemies committing belligerent acts. These are amenable only to their own sover-

eigns for their unlawful conduct, upon whom, under the law of nations, the aggrieved nation may call for redress. All other persons, native or foreign, and resident or transient, are equally bound to observe the penal laws, and for their offences are all alike liable to punishment.

Rem. No court, however, acquires jurisdiction over the person of an offender merely through his commission of a crime. Authority over his person does not exist until he is within the physical custody of the court, and when this authority is once acquired it does not cease by his escape, or his acquittal, or any other event until he is formally discharged. The means by which this authority is obtained and perpetuated are his arrest, commitment, and bail, — the three steps which, taken together, constitute the process in criminal cases.

READ: Clark, Criminal Law (Tiffany Ed.), §§ 172, 173;
Wharton, Criminal Pleading, § 59;
Hawley, on Arrest, pp. 56–58;
Hochheimer, Crimes and Criminal Procedure, § 52.

CHAPTER II

OF THE PROCESS IN CRIMINAL CASES

§ 583. Of Arrest by Warrant.

An *arrest* is the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for the crime. It may be made by warrant, or without a warrant. A *warrant* is a written mandate, issued by a magistrate and directed to an officer or other designated person, commanding him to apprehend the alleged offender and bring him into the appropriate court. It should describe the person to be arrested; the offence with which he is charged; the tribunal before which he is to be brought; and the officer by whom it is to be served; and should be dated and signed by the magistrate who issues it. Armed with this warrant the officer to whom it is directed may arrest the alleged offender wherever he can be found within the territorial jurisdiction of the magistrate, at any time of day or night, and in many cases may break open the doors of any house when necessary to accomplish the arrest. If he is unable to make the arrest without assistance, he may call upon any citizen for aid, or in extreme emergencies may raise the *posse comitatus*, and any person refusing to obey will be held guilty of a misdemeanor. All those who at the summons of the officer engage in the pursuit are clothed, for the time being, with his powers.

Rem. Before a warrant is granted by a magistrate testimony should be presented to him, under oath, sufficient to induce in his mind a reasonable belief that a crime has been committed, and that the accused is the offender. The custom which sometimes obtains of signing *warrants in blank*, leaving the allegations which connect them with particular offences and offenders to be filled in by executive officers or private persons at their own discretion, is a gross neglect of duty on the part of the magistrate, and an abuse of authority on the part of the person serving the warrant on the accused.

READ: 4 Bl. Com., pp. 289–292;
Archbold, Criminal Procedure, pp. 102–114;
Wharton, Criminal Pleading, §§ 1–7, 10, 11, 18–27;
Hawley on Arrest, pp. 19–36;
Rapalje, Criminal Procedure, §§ 7–9;
Clark, Criminal Procedure, §§ 4–9, 13, 15;
1 Bishop, Criminal Procedure, §§ 187–212;
Hochheimer, Crimes and Criminal Procedure, §§ 65, 66;
Vickers, Police Officers and Coroners, pp. 1–164;
Smith, Coroners and Constables, pp. 1–20.

§ 584. Of Arrest without Warrant: Hue and Cry.

In cases where the delay necessary to obtain a warrant might defeat the ends of justice an arrest without a warrant is permitted. Thus *an officer* may *arrest without a warrant* in *three* cases: (1) When a felony, or any crime in violation of the public peace, is actually being committed in his presence by the offender at the time of the arrest; (2) When he has probable cause to believe that a felony has been committed, and that the person arrested is the felon; (3) When a felon once arrested has escaped from custody, and an opportunity to recapture him suddenly arises. A *private person* may arrest without a warrant in *two* cases: (1) When a felony, or any crime in violation of the public peace, is, at the time of the arrest, actually being committed in his presence; (2) When a felony has actually been committed, and he has probable cause to believe that the person arrested is the felon. In all instances of arrest without warrant the prisoner must be at once carried before a proper magistrate in order that he may be committed or enlarged on bail. The right of an officer, or even of a private person, to arrest without a warrant is frequently extended by local laws to cases of emergency other than those above enumerated.

Rem. One form of arrest without warrant is an arrest on *hue and cry*. A *hue and cry* is a general alarm raised by a magistrate or other officer, or in extreme cases by a private person, for the pursuit and capture of a felon, or of some one who has committed a dangerous assault. All persons to whom the summons comes may join in the attempt to arrest the accused, and each of them may resort to any method to effect the arrest which an officer, acting under a warrant, would have the right to employ. Where a warrant accompanies the hue and cry the pursuit may be carried from county to county until the culprit is taken, or escapes

beyond the limits of the State. When the fugitive is once arrested the functions of the hue and cry are exhausted, and unless he eludes his captors and a fresh pursuit becomes necessary they have no further powers except to return him to a magistrate for commitment and bail.

READ: 4 Bl. Com., pp. 292–294;
Archbold, Criminal Procedure, pp. 80–102;
Wharton, Criminal Pleading, §§ 8–9, 12–17;
Hawley on Arrest, pp. 36–47, 58, 59;
Rapalje, Criminal Procedure, §§ 11–14;
Clark, Criminal Procedure, §§ 10–12, 14;
Hochheimer, Crimes and Criminal Procedure, § 67.

§ 585. Of the Act of Arrest.

Actual physical prehension of the body of the accused is necessary to *constitute an arrest* in all cases where he does not knowingly and voluntarily submit himself to custody. Any act of capture, however, such as a touch with the hand or confinement in a room, is a sufficient prehension if the accused knows at the time that the act is intended as a lawful arrest; and though he should immediately free himself, yet the arrest is not thereby vacated, and he will be guilty of an escape. It is the duty of the person attempting to make an arrest, to disclose his official character and purpose to the accused unless his appearance or other circumstances clearly reveal it, so that the accused may understand that the proceeding is, or claims to be, the service upon him of lawful process. It is then the duty of the accused to submit to the arrest; after which he may demand from the officer a statement of the crime with which he is charged, and of the tribunal to which he is about to be carried. This information it is the duty of the officer to give, either by showing his warrant if he has one, or in some other manner sufficient to remove any reasonable apprehension of the accused that he is about to be unlawfully restrained. In effecting the arrest the officer must use no unnecessary violence, but if he meets with resistance he may employ any force short of killing to secure his prisoner when he is charged with misdemeanor, while if the charge be felony he may even take his life.

Rem. An arrest manifestly unlawful requires no submission on the part of the accused, but if he offers any opposition to it he

takes the risk of misjudging its legality, and should he kill the officer and it be afterwards decided that the arrest was lawful, he will be held guilty of murder. An officer who kills in the endeavor to make an unlawful arrest, or who kills unnecessarily in effecting a lawful arrest, commits murder or manslaughter according to the malice involved in the homicide. When a *reward* has been offered for the capture of a criminal, or any other service, it is payable to those who, with knowledge of the offer, render the service within reasonable time after the offer is made and before it has been revoked; unless the service were embraced in their official duties, — in which case many authorities maintain that they have no legal right to a reward.

READ: 3 Bl. Com., pp. 288–290;
4 Bl. Com., pp. 294, 295;
Desty, Criminal Law, §§ 63–65 *c*;
Archbold, Criminal Procedure, pp. 126–131;
Wharton, Criminal Pleading, § 3;
Hawley on Arrest, pp. 13–19, 53–56;
Rapalje, Criminal Procedure, § 10;
Clark, Criminal Procedure, §§ 16–19, 30–33;
1 Bishop, Criminal Procedure, §§ 155–162, 240–246;
Hochheimer, Crimes and Criminal Procedure, §§ 64, 69, 70.

§ 586. Of Arrest on Requisition: Extradition.

No ordinary criminal process is valid outside the territorial jurisdiction of the State under whose authority it was issued. Hence, a criminal fleeing beyond the boundaries of that State would be safe from arrest were there no extraordinary process by which he could be reached. When such a fugitive is still within the limits of the United States he may, however, be captured and returned to his own State by a proceeding called a *requisition*. This issues under that provision of the Federal Constitution which prescribes that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." The *customary procedure* under this provision commences with the finding of an indictment, complaint, or information in the court having jurisdiction of the crime, which must in all respects be as complete and formal as if the accused were already in court to be put upon his trial. This document is then presented to the

governor of the same State, who thereupon forwards it, or a certified copy of it, to the governor of the State where the accused has taken refuge, together with a demand for his arrest and return. If the governor on whom the demand is made is satisfied that the document is in due form, and that the accused is in his jurisdiction and is a fugitive from justice, it is his duty to cause him to be arrested upon process lawful in that State, and to be delivered to the officer representing the State from which he fled. There is no method of compelling the governor of the State of refuge to perform this duty, and if he declines to do so, either arbitrarily or upon pretended legal grounds, the fugitive may there enjoy, at least during that gubernatorial term of office, a safe asylum. If the accused is arrested and returned to his own State he becomes subject to the jurisdiction of its courts for all purposes, and may be prosecuted and punished for other crimes as well as that for which he was arrested under the requisition.

Rem. A requisition is not available where the accused has fled beyond the territorial jurisdiction of the United States into a foreign country, but in many cases he may there be arrested and returned through the process called an *extradition*. The extradition of criminals does not rest on any basis of acknowledged right, but is conceded and regulated by treaties between the United States and various foreign powers. This proceeding is usually limited to the more atrocious crimes, but does not extend to mere political offences, and is conducted through the sovereigns of the treaty States and their diplomatic agents. Statutory tribunals are generally created to act at the instance of the chief executive authority of the country of refuge, when his aid is invoked by the foreign power, in inquiring into the sufficiency of the conditions precedent to the surrender of the accused according to the tests established by the treaty. If the conditions are found to be sufficient the accused is delivered up to the control of the chief executive authority, and by him to the representative of the nation which has demanded the arrest. An extradited criminal can be tried only for the crime in reference to which he was surrendered, unless the stipulations of the treaty otherwise provide.

READ: Archbold, Criminal Procedure, pp. 114–126;
May, Law of Crimes, §§ 84–86;
Wharton, Criminal Pleading, §§ 28–58;
Clark, Criminal Procedure, §§ 22–29;
Hawley, Interstate Extradition, Introd. pp. 5–111;

Spear on Extradition, pp. 13, 15–20, 39–41, 42, 43, 45, 46, 76–84, 221–270, 283–313, 339–460, 496–500, 525–555;
Kenney, Criminal Law, pp. 382–387;
1 Bishop, Criminal Procedure, §§ 219–224 *b*;
Hochheimer, Crimes and Criminal Procedure, §§ 212–220;
Moore on Extradition, §§ 1, 2, 5, 16, 42, 43, 44, 89, 94, 103, 119, 171–175, 205, 219, 226, 235, 243, 256–258, 279–287, 296, 299–305, 337–340, 350–353, 359, 360, 394–396, 516, 521, 522, 529–531, 542, 544–546, 562, 602, 605, 607–612, 616, 618, 622–627, 642–644.

§ 587. Of the Return of Criminal Process: Commitment.

It is the duty of the officer making the arrest to *return the warrant* with the prisoner as speedily as possible to the magistrate who issued the warrant, or to some other tribunal having jurisdiction over the proceedings. If compelled by any reason to delay, he must keep the prisoner securely, by lodging him in jail or otherwise according to the circumstances. When the prisoner is brought before the magistrate the case either at once proceeds to trial, or to a preliminary hearing, or is adjourned to a future day. Unless at once finally decided the prisoner is then committed to jail for safe keeping, or enlarged on bail. The process by which the prisoner is committed to jail is a written mandate, called a *mittimus*, issued by the magistrate or court before whom the alleged offender is presented after his arrest. It is directed both to some proper officer and to the keeper of a lawful place of confinement, commanding the officer to convey and deliver to the keeper the body of the accused, and ordering the keeper to receive and safely detain him during the time specified therein or until he is released by due course of law. It must describe the accused by his full name, or the name he gives as his; must set out with convenient certainty the crime with which he is charged; and must be dated and signed by the magistrate who issues it. In pursuance of this mandate the accused person, if not duly bailed, is taken to the designated place of imprisonment, and delivered with the mittimus to the jailer, and there confined according to its precept.

Rem. Where the crime charged is one over which the magistrate, before whom the prisoner is brought, has final jurisdiction he may immediately proceed to trial, and convict or acquit the accused. If the offence is not within the final jurisdiction of

the magistrate, and if under the local law he must now conduct a preliminary examination of the case in order to determine whether the accused should be delivered to a higher court for trial, this examination may take place at once, or be adjourned to some more convenient occasion. If the trial or examination does proceed, a formal complaint under oath, having the general attributes of an indictment, must be filed with the court. To this complaint the accused must plead, and upon it the court, having heard the witnesses and arguments, will pass judgment; acquitting or convicting the accused if the crime is in its final jurisdiction; holding him for future trial in the higher court, or discharging him for want of probable cause, if the jurisdiction over the offence resides in the superior tribunal. In any disposition of the case, except by acquittal or discharge, commitment or bail becomes immediately necessary.

READ: Archbold, Criminal Procedure, pp. 132–165;
Wharton, Criminal Pleading, §§ 70–73;
Hawley on Arrest, pp. 50–53;
Rapalje, Criminal Procedure, §§ 15–20;
Clark, Criminal Procedure, §§ 20, 35;
1 Bishop, Criminal Procedure, §§ 164–186, 213–218, 225–239 *a*;
Hochheimer, Crimes and Criminal Procedure, §§ 72–77, 87.

§ 588. Of Bail.

With the exception of capital cases where the proof of guilt is evident or the presumption is great, and of other cases specified by local statutes, all offences are now in this country regarded as *bailable;* and the person charged with them is entitled to his liberty upon giving sufficient security for his appearance in court whenever necessary, to answer to the charge. This security sometimes takes the form of *money deposited* with the court; sometimes of a *bond,* signed and sealed by the accused and one or more sureties, and stipulating for the payment of a certain sum if he should fail to appear as directed; sometimes of a *recognizance,* which is an oral pledge of the same character given by the prisoner and his sureties to the court and entered on its records, to be reduced to writing whenever it becomes necessary. The *amount* of the security is determined by the court. It must not be so excessive as to be beyond the reach of ordinary citizens, and yet must be sufficient to secure, as far as possible, the appearance of the accused; and hence, in fixing its amount, the nature of the crime, its probable penalty, the incriminating

proof, the character of the accused, and his pecuniary circumstances, are all to be considered. The condition which the security binds him to fulfil is to appear in court at the time named therein, and abide the order which may then be made in reference to the case. If the time named be a single day he complies with the condition by being present on that day. If the stipulation obligates him to remain in court, until discharged by due course of law, he must be in attendance, or where his presence can at any time be given, as long as the proceedings are pending in the court. Any failure in this duty renders the security liable to be *forfeited*, by calling upon the accused in open court to appear at once and demanding his production by his sureties; after which, if he is not produced, both he and they are liable to suit for the recovery of the stipulated sum. The forfeiture and collection of the security by the State does not condone the offence of the accused, nor prevent his subsequent arrest, prosecution, and punishment. A person entitled to bail, but not permitted by the court to offer it and obtain his release, may apply to another court or judge for a writ of *habeas corpus*.

Rem. During the life of the security the accused is in the custody of his sureties wherever he may personally be located, and they may at any time arrest him and surrender him to the court; or they may obtain from the court a warrant, called a *bail-piece*, on which he may be captured by them or their accredited agent at any place where they can find him, and be returned with the bail-piece to the court. By such surrender or recapture of the accused, and his return to the court, the sureties are discharged from further liability, as well as by any change made without their consent in the obligation of the security, or by any action of the prosecutor which is prejudicial to their rights, or by the death of the accused himself.

READ: 4 Bl. Com., pp. 296–300;
Archbold, Criminal Procedure, pp. 165–206;
Wharton, Criminal Pleading, §§ 62, 74–81, 978–1011;
Rapalje, Criminal Procedure, §§ 21–62, 459–477;
Clark, Criminal Procedure, §§ 36–45, 224–228;
1 Bishop, Criminal Procedure, §§ 247–264;
Hochheimer, Crimes and Criminal Procedure, §§ 78–82, 224–226.

§ 589. Of the Treatment of the Accused while in Custody.

The *sole legitimate purpose* to be accomplished by keeping the accused in custody is that he may be present in the court to answer to the charge, and therefore he cannot lawfully be subjected to any imposition or restraint which is not necessary to that end. While his person may be searched at his arrest, and instruments or evidences of his crime, or weapons with which he might perpetrate further mischief, may be taken from him, he cannot be deprived of his money or other innocent property except to place it for him in safe keeping until his release. He is entitled to consult with friends and counsel without delay in order to prepare his defence or to secure his release on bail. He cannot be compelled to submit to any examination, or to make any disclosures against himself; but if he desires to do so it must be permitted after a proper caution to him that the statement may be used against him at the trial. He must be physically cared for as his needs require, and otherwise treated as a citizen whose innocence is presumed until his guilt is proved.

Rem. The despotic practices of the Old World, with their various forms of inquisitorial torture, are wholly foreign to the spirit of our institutions, as they also were to the Christian civilization of the nations by whom they were and perhaps still are, in some cases, employed. The introduction of these practices into our modern American police and detective systems under the names of the "*sweating process*," the "administration of the *third degree*," etc., so patiently submitted to by our people, and so strangely tolerated by some of our courts, finds no justification in any doctrine of our law.

READ: Wharton, Criminal Pleading, §§ 60, 61;
Hawley on Arrest, pp. 47–49;
Clark, Criminal Procedure, §§ 34, 35, 52, 53;
Underhill, Criminal Evidence, § 54;
1 Bishop, Criminal Procedure, § 163;
Hochheimer, Crimes and Criminal Procedure, § 71;
Rice, Criminal Evidence, §§ 429–433.

CHAPTER III

OF THE PLEADINGS IN CRIMINAL CASES

§ 590. Of the Formal Accusation against the Alleged Offender.

The prosecution of a crime commences with the presentation to the court, having jurisdiction over the offence and the offender, of a *formal written accusation* charging him with the crime. Whatever takes place prior to this step in the proceedings is preliminary to the prosecution, and not one of its essential parts. This accusation is sometimes filed before the warrant issues or the arrest is made; sometimes after the arrest and before the commitment or release on bail; sometimes after the release on bail and the transfer of the proceedings into a higher court. Thus when the magistrate who issues the warrant can take final jurisdiction over the offence, the accusation may be presented to him before he signs the warrant or after the arrest and return. When the magistrate to whom the warrant and the prisoner are returned cannot or does not assume final jurisdiction, but holds the accused for trial before a superior tribunal, it is in the latter court that the formal accusation must be made.

Rem. A formal accusation before a police court or a justice is commonly called a "*complaint*," and is prepared by the magistrate, or by some legally authorized person, who confirms it by his individual or official oath. In its general features this complaint is governed by the same rules as an indictment. A similar complaint is frequently presented when the magistrate has no final jurisdiction, in order to serve as a guide in the preliminary proceedings, although it will be superseded by the true formal accusation in the higher court.

READ: Heard, Criminal Pleading, pp. 32–40;
Clark, Criminal Procedure, §§ 50, 51;
1 Bishop, Criminal Procedure, §§ 415–420, 716–727.

§ 591. Of the Formal Accusation: Indictment; Presentment; Information.

A formal accusation in the higher courts may be made either by indictment, presentment, or information. An *indictment* is a written accusation presented by a grand-jury, under oath and upon the suggestion of the public prosecutor, to a court having jurisdiction of the offence charged therein. A *presentment* is a written accusation presented by a grand-jury, under oath and of their own motion, to a court having jurisdiction of the offences charged therein, in pursuance of their official duty to inquire into and bring to the attention of the court any crimes which may come under their notice. Upon receiving this presentment, if it discloses a wrong capable of being prosecuted, the court directs an indictment to be framed, and a warrant to issue for the alleged offenders. An *information* is a written accusation, presented under oath by a proper public prosecutor to a court having jurisdiction of the offences charged therein.

Rem. As between an indictment and an information the local law determines which shall be employed. In prosecutions in the Federal Courts the Constitution of the United States requires that all accusations for capital or infamous crimes shall be made by a grand-jury by presentment or indictment; leaving other offences to be pursued by information. In the individual States the rule varies; with a general tendency, however, to resort to an indictment for all serious crimes on account of the advantages accruing both to the government and the accused from the preliminary investigation of the case by a grand-jury.

READ: 4 Bl. Com., pp. 301–312;
Archbold, Criminal Procedure, pp. 207–210, 322;
Heard, Criminal Pleading, pp. 27–32;
Wharton, Criminal Pleading, §§ 85–89;
Rapalje, Criminal Procedure, §§ 110–114;
Clark, Criminal Procedure, §§ 46, 49;
1 Bishop, Criminal Procedure, §§ 129 *a*–153, 712–715;
Hochheimer, Crimes and Criminal Procedure, §§ 83–86.

§ 592. Of the Grand-Jury.

A *grand-jury* is a body of men, legally selected from among the people of a county, to inquire what offences have been committed therein. When assembled in court they are sworn, and instructed in their duty by the judge. An indictment prepared

by the public prosecutor against the alleged offender is then laid before them, together with the evidence in its support. If twelve of the grand-jury agree that the evidence is sufficient to put the accused upon his trial, the foreman endorses the indictment as "*a true bill*," and it is returned into court in order that the offender may be tried thereon. If twelve do not agree that the evidence is sufficient, the indictment is endorsed "*not a true bill*," and returned into court; whereupon the accused is either discharged, or held to await action on a new indictment.

Rem. Irregularities in summoning the grand-jury, or disqualifications in the grand-jurors themselves, or provable misconduct in their operations, may be taken advantage of by the accused, either by challenges to the array or to the polls before they have been sworn, or by plea in abatement or by motion to quash after the indictment is found, according to the local practice.

READ: 4 Bl. Com., pp. 302–306;
Archbold, Criminal Procedure, pp. 304–311;
Wharton, Criminal Pleading, §§ 332–381;
Rapalje, Criminal Procedure, §§ 63–79, 86;
Clark, Criminal Procedure, §§ 47, 48;
Underhill, Criminal Evidence, §§ 25–30;
1 Bishop, Criminal Procedure, §§ 695–704, 849–889;
Abbott, Criminal Brief, pp. 16–20;
Rice, Criminal Evidence, § 151.

§ 593. Of the Indictment or Information: its General Requisites.

Except that an information is presented by the public prosecutor, and an indictment by a grand-jury, they are substantially the same in character, form, and requirements. Each must contain a statement of all the facts and circumstances necessary to constitute the crime, set forth with such particularity and certainty that the accused may know the nature of the offence with which he is charged and what he has to answer; that the petit-jury may be warranted in their conclusion of guilty or not guilty upon the premises delivered to them; that the court may see upon the record a definite issue upon which judgment may be rendered; and that the record of conviction or acquittal may be pleaded in bar to a subsequent prosecution for the same offence. The rules which have been established for the purpose of securing this particularity and certainty relate principally to the allega-

tions concerning (1) The person of the accused; (2) The place where and the time when the criminal act was committed; (3) The person or property injured; (4) The actions or omissions which constituted the crime itself.

Rem. The formal requisites of an indictment are similar to those which govern declarations in civil actions at common law. The indictment or information may contain one or more *counts*. Each count must of itself be a full and complete charge of crime, and must be sufficient to sustain a verdict; for no number of defective counts can make a good indictment. Matter stated in one count may, however, by reference thereto be made part of a subsequent count without restating it at length. Different counts for different offences by the same offender may be *joined* in one indictment in cases of misdemeanor; and where one of the offences is embraced in the other, or where both offences are parts of the same transaction, such joinder is allowable in felony. Different offences of the same nature when committed by different persons, and different offenders when alleged to have been joint actors in the commission of the same crime, may be sometimes similarly combined in the same accusation. But two *distinct offences*, whether by the same or different offenders, cannot be charged in the same count; and if this should be done the count will be bad for *duplicity*. An apparent exception to this rule exists where successive acts of the same nature by the same person are laid in the same count with a *repetendo;* or a long enduring and constantly injurious offence is described with a *continuando;* in which two cases the crimes are one or several according to the evidence adduced. When material allegations in the same count contradict one another, the count is bad for *repugnancy*. If the allegations are in the disjunctive, or in any other way fail to specify precisely what crime was committed, the count is bad for *uncertainty*. Immaterial allegations are *surplusage*, and inconsistencies therein do not vitiate the count. When one count in an indictment is good, a general verdict of guilty will be sustained as applicable to that count, though all the other counts are defective.

READ: Archbold, Criminal Procedure, pp. 234–240, 275–284, 288–304;
Heard, Criminal Pleading, pp. 41–47, 112–144, 226–259, 325–327;
Wharton, Criminal Pleading, §§ 91–95, 243–256, 279–315;
Rapalje, Criminal Procedure, §§ 80, 85, 100–108;
Clark, Criminal Procedure, §§ 55–57, 99–114, 119–121;
1 Bishop, Criminal Procedure, §§ 318–359, 421–453, 462–492, 647–668;
Hochheimer, Crimes and Criminal Procedure, §§ 90–94, 96, 105–109.

§ 594. Of the Indictment or Information: the Description of the Accused, and of the Place and Time of his Offence.

The *accused must be described* by his proper name if it be known, and this name must be stated at length, including his Christian name and surname, and be repeated in every distinct allegation. If he be known by different names, they should be stated under an *alias*. If his name be not known he should be described by some arbitrary name, and if he pleads in bar under that name it will be taken as his true name; while if he pleads in abatement for the misnomer he must set forth in his plea his true name, which will then be substituted for the other. His *place of residence* must also be alleged, if known; if not known, he may be described as a transient person. Any mistake in these particulars can be taken advantage of only by a plea in abatement which will result in the correction of the error. Since the jurisdiction of the court depends in part upon the *locality of the crime*, the indictment must show upon its face that the criminal act occurred within the territory over which the court is authorized by law to exercise judicial cognizance. If this should not be shown the indictment could be quashed for want of jurisdiction, or a plea to the jurisdiction could be successfully interposed. It would also be held invalid on a demurrer, or on a motion in arrest of judgment, or on a writ of error. The fact that the offence was in the local jurisdiction of the court is made to appear by the correspondence between the *venue* laid in the indictment and the subsequent description of the place where the crime was committed. The *venue* is a short statement at the head of the indictment, in one or more words, naming the county or other political subdivision in and for which the court is held. In the body of the indictment are set forth the specific allegations which describe the place of the offence according to the rules already explained concerning the locality of crimes. Some particular *day, month, and year* must also be alleged as the date of each independent act involved in the crime charged, and this date must show that the offence has been committed within the time allowed by the Statute of Limitations for the preferment of the charge. Where the crime has been created by a statute the indictment must describe it as having been perpetrated at a date after the statute was enacted.

Rem. In stating certain crimes a more minute particularity must be observed in describing times and places, so as to distinguish the occurrence from any possible alternative. Thus in burglary that act must be alleged to have been performed at or between such hours as were within the night season on the day designated, and the location of the dwelling house must be averred by street and number, or some other precise unmistakable description. In murder also the dates of the homicidal act and of the death must both be stated, so that an interval of more than a year and a day between them appears to have been impossible.

READ: 4 Bl. Com., p. 306;
Archbold, Criminal Procedure, pp. 211–233, 241–265, 784–797, 1071–1076;
Heard, Criminal Pleading, pp. 48–92;
Wharton, Criminal Pleading, §§ 96–108, 120–150, 316–329;
Rapalje, Criminal Procedure, §§ 81, 83, 94–96;
Clark, Criminal Procedure, §§ 58, 95–97;
Underhill, Criminal Evidence, §§ 31–37;
1 Bishop, Criminal Procedure, §§ 360–414, 669–689 *b*;
Hochheimer, Crimes and Criminal Procedure, §§ 97, 98;
McClain, Criminal Law, §§ 369–394.

§ 595. Of the Indictment or Information: the Description of the Criminal Act and of the Person or Property Injured.

Each and every action or omission necessary to constitute the crime must be so particularly and accurately stated as to fix and define, beyond doubt, the exact charge which the prosecutor makes against the accused. If the crime is an offence under the unwritten law of the State, for which a form of indictment has become established by usage in the courts, that form should be followed. If the crime is created or modified by statute it is sufficient to describe it in the words of the statute, provided such words contain a full and complete enumeration of all the acts necessary to constitute the offence; if not, the words of the statute must be supplemented by additional words which make the description commensurate with the legal definition of the crime. The statement of the acts committed must be positive and assertive; not laid with a *whereas*, nor by way of recital, nor argumentatively. When the criminal act consists in an injury to property, the injured property must be specifically described by its character, ownership, value, and other attributes sufficiently

to distinguish it from every other article of property. The person injured by the crime must be named if his name be known; otherwise, he must be designated as a person unknown to the prosecutor.

Rem. Where the law has made certain technical words necessary to the definition of a crime, such words must always be employed. Thus in felonies the act must be alleged to have been performed "*feloniously*"; in treason, "*traitorously*"; in burglary, "*burglariously*"; in robbery, "*against the will*"; in piracy, "*piratically*"; in murder, "*with malice aforethought.*" Also in murder it must be charged that the accused did "*kill and murder*"; in rape, that he did "*ravish and carnally know*"; in mayhem, that he did "*maim*"; and in barratry, that he "*is a common barrator.*" For these words, and for such others as are by law made technically descriptive of the whole crime, or of any of its essential parts, there are no legal equivalents, and an indictment from which they are absent cannot be sustained.

READ: 4 Bl. Com., p. 307;
Archbold, Criminal Procedure, pp. 265–275, 284–288, 1141–1174;
Heard, Criminal Pleading, pp. 93–111, 145–225;
Wharton, Criminal Pleading, §§ 109–119, 151–241, 257–273;
Rapalje, Criminal Procedure, §§ 82, 84, 87–93, 97–99;
Clark, Criminal Procedure, §§ 59–94, 98;
1 Bishop, Criminal Procedure, §§ 77–112, 493–642, 690–694;
Hochheimer, Crimes and Criminal Procedure, §§ 95, 99–104.

§ 596. Of the Arraignment.

When the formal accusation is presented to the court, if the accused is already in custody or has been arrested and enlarged on bail, he must *appear* in person or by attorney and make answer to the charge. If he is not yet arrested a *bench-warrant* may be issued by the court, and the accused may be brought immediately to its bar without a preliminary proceeding before an inferior tribunal. In all criminal prosecutions the alleged offender has a right to be *present in court* during all the essential stages of the case, from the preferment of the accusation to the final sentence; and if the charge against him is a felony, or any offence for which a corporal punishment may be inflicted, he must be present whenever anything material to the progress of the case is performed. Hence, to indictments for such offences he must appear and *plead in person:* in other cases he may waive

his right to be present, and appear and *plead by attorney*. When he is to plead in person he must be formally *arraigned* by calling him to the bar of the court during its open session, where the indictment will be read to him and he will be required to state whether he is guilty or not guilty of the offence charged therein. To this arraignment he may answer by motions, by a dilatory plea, by demurrer, or by a plea in bar according to the nature and scope of his defence.

Rem. When an accused person makes no answer upon his arraignment, he is said to *stand mute*. This may occur either through his obstinacy, or because he is dumb, or is insane, or is ignorant of the language in which the proceedings are conducted. Anciently his silence was always attributed to obstinacy, and, as under the then existing law he could not be tried except upon his plea, the most rigorous and even fatal measures were resorted to in order to force him to answer. Under the modern law, if he stands mute through obstinacy or is dumb, the court will order a plea of not guilty to be entered for him and the case will then proceed. When he appears to be insane, a jury will be appointed to inquire into his sanity, and if they find him insane he will be remanded for safe-keeping, and the proceedings will be stayed until he recovers or until his case is otherwise determined. Where he is ignorant of the language, an interpreter will be provided to acquaint him with the charge, and to inform the court of his reply.

READ: 4 Bl. Com., pp. 318–329;
Archbold, Criminal Procedure, pp. 323–333;
Wharton, Criminal Pleading, §§ 699–701;
Rapalje, Criminal Procedure, §§ 115, 116;
Clark, Criminal Procedure, §§ 127, 128;
1 Bishop, Criminal Procedure, §§ 728–733 *b*;
Abbott, Criminal Brief, pp. 11, 12, 24–30;
Hochheimer, Crimes and Criminal Procedure, §§ 112, 113.

§ 597. Of Counsel and Guardian for the Accused.

The accused has a right to be represented by *counsel* of his own selection if he is able to employ them; but where he cannot or does not secure them for himself the court should appoint some capable member of the bar to aid him in preparing and presenting his defence. In making this appointment the court is not bound to regard the preferences of the accused, though where they are reasonable it generally does so; and if the accused

refuses to accept the services of the attorney designated by the court he may be tried without one. Where the accused is an infant, and has no guardian of his own, the court will appoint a *guardian ad litem* for him, and should this not be done a verdict against him would be reversible on error.

Rem. Over the counsel for the defence the court will always exercise a certain supervision, lest through his carelessness or ignorance the cause of the accused suffer injury. Even where the accused chooses his own counsel at his own expense the same duty rests upon the court; and it is good ground for a new trial if this duty is neglected. Where counsel for the defence are appointed by the court, and the accused is unable to give them proper compensation, it is the law of some States that they shall be paid from the governmental treasury. In other States they are left to that invisible reward, which accompanies so many valuable services rendered by a noble profession to an unappreciative public.

READ: Wharton, Criminal Pleading, §§ 557–559;
Rapalje, Criminal Procedure, § 219;
Clark, Criminal Procedure, §§ 156, 157;
1 Bishop, Criminal Procedure, §§ 295–313;
Abbott, Criminal Brief, pp. 1–11.

§ 598. Of Motions to Quash: Motions for a Change of Venue.

A *motion to quash* the indictment or information is a request, addressed orally or in writing to the court, praying that no further proceedings may be had thereon. This motion may be based either upon matters apparent on the record, or upon extrinsic matters which are able to be brought to the attention of the court, and which manifest the inexpediency of further proceedings. It should be made before or at the time of the arraignment, although the court has power to hear and allow it at any time before the verdict. A motion for a *change* of *venue* is a request addressed to the court, praying that the proceedings may be transferred to another county or local jurisdiction, on the ground that a fair and impartial trial cannot be had in the place where the case is pending. This motion can always be made by the accused, and in some States by the public prosecutor also; and must be supported by affidavits or other evidence of the circumstances which prevent a proper trial in the present juris-

diction. Where a change of venue is granted no new arraignment is required if the accused has already made a formal answer to the accusation.

Rem. Both these motions are addressed to the discretion of the court and are governed largely by local practice. If they are overruled, and the discretion of the court has been fairly exercised, there is no ground of error, but they may be repeated if new circumstances arise which might lead to a different decision.

READ: Archbold, Criminal Procedure, pp. 318–321, 531–539;
Heard, Criminal Pleading, pp. 260, 261;
Wharton, Criminal Pleading, §§ 83, 385–397, 583–602;
Maxwell on Pleading and Practice, §§ 71–78;
Rapalje, Criminal Procedure, §§ 142–144, 157–177, 222;
Clark, Criminal Procedure, §§ 124–126, 142–144;
1 Bishop, Criminal Procedure, §§ 67 *a*–76, 114, 757 *a*–774;
Abbott, Criminal Brief, pp. 30, 31, 46–86;
Hochheimer, Crimes and Criminal Procedure, §§ 114–117, 147.

§ 599. Of Dilatory Pleas.

A *dilatory* plea is an answer made by the accused to the information or indictment, setting forth some reason of fact or law why the proceedings against him, at least in their present form, should be discontinued. As in civil cases these reasons relate either to the authority of the court, or to the mode in which the proceedings may have thus far been conducted; and are alleged in a plea to the jurisdiction or in a plea in abatement. A *plea to the jurisdiction* is an allegation that the court before which the case is pending has no authority to hear and determine it, either on account of the nature or the locality of the offence, or of some legal exemption attaching to the person of the accused. Where the want of jurisdiction appears on the face of the record, the objection may be made by a motion to quash. Where it depends upon extrinsic circumstances it must be brought to the attention of the court by a formal plea. As no jurisdiction over the offence can be conferred by consent, the accused does not waive the right to take advantage of a want of jurisdiction by pleading in bar; but may insist upon it under the issue of not guilty, or by motion in arrest of judgment, or by a writ of error. A *plea in abatement* is an allegation that the proceedings are void by reason of some defect or irregularity therein. The

principal grounds for this plea are the misnomer or misdescription of the accused, and irregularities in the summoning or conduct of the grand-jury, or in the other preliminary steps before the arraignment. To dilatory pleas the prosecution may reply by traverse or demurrer, and the issues thus presented will then be heard and decided by the court.

Rem. The defects of which advantage may be taken by a plea in abatement in criminal prosecutions are few, as compared with those available in civil suits. Irregularities in the process or its service are of no importance, since if the accused is in the custody of the court it is immaterial whether he was brought there by lawful or unlawful means, and any defects which might embarrass the record are curable by the issue of a new warrant and his arrest thereon. The pendency of another indictment for the same offence, or a variance between the indictment and the warrant are also unavailable, since in the first instance a conviction or acquittal on either indictment will be a bar to further proceedings in the other; and in the second, except in certain extradition cases, the grand-jury may present any indictment which is demanded by the evidence before them, on whatever warrant the accused may have been arrested.

READ: 4 Bl. Com., pp. 333–335;
Archbold, Criminal Procedure, pp. 336, 337;
Heard, Criminal Pleading, pp. 265–269;
Wharton, Criminal Pleading, §§ 422–433;
Rapalje, Criminal Procedure, §§ 120–123;
Clark, Criminal Procedure, §§ 130, 131;
1 Bishop, Criminal Procedure, §§ 734–743, 787–794;
Abbott, Criminal Brief, pp. 88–100, 149–151;
Hochheimer, Crimes and Criminal Procedure, §§ 119, 120.

§ 600. Of Demurrer.

A *demurrer* is an allegation that the indictment or information is insufficient in the law, either because the acts described therein do not constitute a crime, or because the allegations it contains are defective in form. Ordinarily, a demurrer must be filed, if at all, before pleading in bar, but the court for sufficient reasons may permit a plea in bar to be withdrawn and a demurrer substituted in its place. Where a demurrer on matters of substance is sustained by the court the accused will be discharged from further liability under that indictment, but is not protected from immediate re-arrest upon a different charge; while if

matter of form alone is in issue he may be detained until a new indictment can be presented by the grand-jury, or the information can be amended by the prosecutor. In certain States the local practice allows the amendment of an indictment also in mere formal matters by the prosecutor, without recourse to the grand-jury. Where an indictment contains several counts, and is demurred to as a whole, the demurrer may be sustained as to the defective counts, and overruled as to the others. All essential facts which are properly set forth in the indictment are admitted by the demurrer to be true; and hence, if the demurrer is overruled, final judgment should logically be rendered against the accused. This matter, however, rests in the discretion of the court, and as a practical rule the accused is allowed to plead over, if he desires to do so, in all cases of felony, and usually also in cases of misdemeanor.

Rem. Anciently defects of form as well as of substance were available after verdict on a motion in arrest; and in many instances it was then advisable for the accused to defer his objection, taking the chance of a verdict in his favor, and urging the objection if the jury found him guilty. The modern rules treat formal objections as waived unless insisted on by demurrer or motion before plea, allowing only defects of substance as a ground of error after verdict.

READ: 4 Bl. Com., p. 334;
Archbold, Criminal Procedure, pp. 313–316, 354–357;
Heard, Criminal Pleading, pp. 270–278, 310–315, 320–324;
Wharton, Criminal Pleading, §§ 90, 273–278 *a*, 400–407 *b*;
Rapalje, Criminal Procedure, §§ 109, 119, 223;
Clark, Criminal Procedure, §§ 115, 116, 132;
1 Bishop, Criminal Procedure, §§ 704 *a*–711, 775–786;
Abbott, Criminal Brief, pp. 37–43;
Hochheimer, Crimes and Criminal Procedure, §§ 110, 118.

§ 601. Of the Plea of Guilty: Nolo Contendere.

A *plea of guilty* is a formal acknowledgment by the accused, in open court, that the allegations of the indictment or information are true. It is not necessarily a confession of guilt, since the indictment may not properly charge a crime; but if the indictment is correct in form and sufficient in substance this plea is a waiver of a trial, and is equivalent to a verdict of guilty on which the court may proceed to judgment. A plea of *nolo contendere*

is an indirect plea of guilty by which the accused declines to traverse or demur to the indictment, and throws himself on the mercy of the court. This plea admits nothing that can afterwards be taken advantage of by any private interested party, and is resorted to for the purpose of disposing of the case with the least possible trouble, and with as small a penalty as the court can be induced to give. The same object is sometimes accomplished by a demurrer which is overruled and followed by a sentence. Neither a plea of guilty nor a *nolo contendere* will prevent the accused from raising an objection to an indictment, which is defective in substance, by a motion in arrest.

Rem. In capital cases, where the defendant pleads guilty, it is customary for the court to advise him to change his plea to not guilty and submit himself to a trial, but it cannot compel him to do so; and if he insists on his plea of guilty it must be so entered on the record, and the court must either suspend judgment or sentence him according to law. If the accused has, without due consideration, pleaded guilty the court will also, in important cases, allow him before sentence to retract his plea, and plead not guilty.

READ: 4 Bl. Com., p. 329;
Heard, Criminal Pleading, pp. 262–265;
Wharton, Criminal Pleading, §§ 408–421;
Rapalje, Criminal Procedure, § 118;
Clark, Criminal Procedure, § 129;
1 Bishop, Criminal Procedure, §§ 744–757, 794 *a*–802;
Abbott, Criminal Brief, pp. 143–148;
Hochheimer, Crimes and Criminal Procedure, §§ 124, 125.

§ 602. Of the Plea of Former Jeopardy.

A *plea of former jeopardy* is an allegation that the accused has already been in jeopardy for the offence now charged in the indictment. It is a maxim of our law that no person can be twice put in jeopardy for the same crime; and therefore when this plea can be substantiated it operates as a complete defence. Two questions are presented by this plea: *First*, Has the accused ever been in jeopardy? *Second*, Was it for the same offence? In answer to the *first question* the following points may be regarded as well settled by the courts: (1) That jeopardy does not begin until the trial jury has been impanelled and

sworn, and the case has been committed to them for investigation on the issues tendered by the pleadings; (2) That if the trial ends without a verdict through the act or with the consent of the accused, or through a want of jurisdiction in the court or from defects in other proceedings, there has been no jeopardy; (3) That where the jury are dismissed on account of the death or illness of one or more of them, or because of their hopeless disagreement, though against the protest of the accused, he has not been in jeopardy. On the other hand it is settled that *former jeopardy existed* if the accused has been already convicted or acquitted on a valid indictment. But whether the accused has been in jeopardy where after the trial was begun, and while it was progressing with every prospect of reaching a verdict, the prosecutor of his own motion, and against the protest of the accused, discontinued the proceedings by a *nolle prosequi*, is a matter upon which the rulings of the courts are not in harmony with one another. In answer to the second question the modern doctrine of our courts is that the accused has been in jeopardy for the same offence in the following cases: (1) When he has been legally convicted or acquitted on an indictment charging the accused with having committed precisely the same offence against the same sovereignty; (2) When he has been already legally convicted or acquitted by a general verdict on an indictment which alleged his commission, against the same sovereignty, of a higher crime in which the offence for which he is now prosecuted was embraced as one of its essential elements, and of which he might have been separately convicted if the evidence had proved him guilty; (3) When he has already been legally acquitted on an indictment charging him with a lesser offence which is an essential element in the greater crime set forth in the present indictment; (4) When under an indictment for a higher crime, of which the crime now charged against him is an essential ingredient, he has been convicted of any lesser offence whatever, and thus has been impliedly acquitted of the rest. Whether a previous conviction on an indictment for a lesser offence, which is necessarily included in the higher crime alleged in the present indictment, is proof of former jeopardy is a disputed question; some courts regarding it as a complete defence; others ignoring it, especially in cases where the offence has taken

on its graver character through consequences resulting since the previous conviction.

Rem. A plea of former jeopardy when based on a conviction is called a plea of "*autrefois convict*"; when based on an acquittal, a plea of "*autrefois acquit.*" It must set forth the record of the former conviction or acquittal, and aver that the offence and the offender described therein are identical with those now before the court. It closes with a verification, and may be met with a demurrer or a denial. The accused must establish the allegations of his plea by proper documentary and oral evidence. If he does this, he is entitled to his discharge; if not, he is generally permitted to plead over, and go to trial on the merits of the case.

READ: 4 Bl. Com., pp. 335–337;
Archbold, Criminal Procedure, pp. 338–352;
Heard, Criminal Pleading, pp. 279–295;
Hawley, Criminal Law, pp. 76–79;
Clark, Criminal Law (Tiffany Ed.), § 174;
Wharton, Criminal Pleading, §§ 429–520;
Wharton, Criminal Evidence, §§ 570–593;
Rapalje, Criminal Procedure, §§ 124–141;
Clark, Criminal Procedure, §§ 133–138;
Underhill, Criminal Evidence, §§ 194–198;
1 Bishop, Criminal Law, §§ 978–1070 *a*;
1 Bishop, Criminal Procedure, §§ 805–831;
Abbott, Criminal Brief, pp. 100–142;
Hochheimer, Crimes and Criminal Procedure, § 121;
Rice, Criminal Evidence, §§ 381–385.

§ 603. Of the Plea of Pardon.

A *plea of pardon* is an allegation that the accused has been released, by competent authority, from liability to prosecution and punishment for the offence charged in the indictment. The *power to pardon* offences against the United States, except in cases of impeachment, is vested in the President. In the individual States it is lodged in the governor, legislature, board of pardons, or other authorities, according to their local laws. A pardon is a matter of pure discretion, and may be either *absolute or conditional;* and if conditional is valid only when and so long as the condition is fulfilled. It *takes effect* from the delivery of the charter of pardon to and its acceptance by the offender; and its operation is limited to the particular offences which the charter describes. A *plea of pardon* must set out the charter, and make

profert thereof; and the charter itself duly verified must be produced in court, together with evidence identifying the accused with the person pardoned. Where, as in some political cases, pardon is granted to a large number of persons by a public statute, or a proclamation of amnesty, the courts take judicial notice thereof, and only proof to show that the accused was included in the number pardoned is required.

Rem. A *commutation of sentence*, or an indefinite *suspension of judgment* after verdict, are not the equivalents of a pardon. While they may prevent or nullify the punishment they do not, like a pardon, extinguish the guilt and imputation of the crime.

READ: 4 Bl. Com., pp. 337, 338;
Archbold, Criminal Procedure, p. 353;
Heard, Criminal Pleading, pp. 295, 296;
Wharton, Criminal Pleading, §§ 521–536;
Clark, Criminal Procedure, §§ 139, 140;
1 Bishop, Criminal Law, §§ 897–926 *a*;
1 Bishop, Criminal Procedure, §§ 832–848;
Abbott, Criminal Brief, p. 143;
Hochheimer, Crimes and Criminal Procedure, §§ 122, 201–203.

§ 604. Of the Plea of Not Guilty.

A *plea of not guilty* denies all the allegations of the indictment, as well as the legal sufficiency of the matters alleged to constitute a crime. It is the only plea which puts in issue the actual guilt or innocence of the accused, and therefore it raises every question of fact or law involved in his relation to the supposed offence; including his mental capacity, his commission of the act, the existence of the criminal and specific intents, and every form of justification or excuse. This plea is offered *orally* by the accused upon his arraignment, and is entered on the record together with the replication of the prosecutor that the accused is guilty as alleged.

Rem. Upon the plea of not guilty the prosecution has the *burden of proof*, and though as to some special lines of defence the accused is expected to take the initiative, and go forward in explaining and adducing evidence in support of what he claims, the prosecution must prove its case in every essential detail, and beyond reasonable doubt, upon the whole issue of guilty or not guilty as created by the plea.

READ: 4 Bl. Com., pp. 338–341;
Archbold, Criminal Procedure, pp. 333–335;
Heard, Criminal Pleading, p. 297;
Rapalje, Criminal Procedure, § 117;
Clark, Criminal Procedure, § 141;
Hochheimer, Crimes and Criminal Procedure, § 123.

CHAPTER IV

OF THE TRIAL, JUDGMENT, AND EXECUTION IN CRIMINAL CASES

§ 605. Of the Trial: the Right of Trial by Jury.

A *trial* is a legal investigation by a competent tribunal of the issues created by the formal accusation and the plea. No trial upon the merits can take place except under the plea of not guilty, and this trial must in most cases be conducted before a petit-jury, acting under the supervision and with the assistance of the judge. The *right of trial by jury,* as guaranteed by the Federal and State Constitutions, does not extend to trivial offences, nor to cases of contempt, nor to proceedings wholly unknown to the law at the time these constitutions were adopted. Nor does it secure to the accused in any case a trial before a jury immediately upon his apprehension, or without first passing through a trial before some subordinate tribunal. It is considered by the courts that the right is fully vindicated if the accused is so protected that he cannot be punished, against his will, for an alleged offence without the submission of his case to a jury of his peers.

Rem. Thus it is the practice to endow inferior courts with power to hear and determine criminal cases without a jury, giving to the accused an appeal, if he desires it, to a higher court where a jury can be had; or to offer the accused an election between a speedy trial before a single judge and a postponement until a session of the court to which a jury will be summoned; and both these practices, though undoubtedly most oppressive in many instances, are regarded by the present law as consistent with the constitutional rights of the accused. In felonies, and sometimes in other crimes, it is held that an accused person must be tried by jury; and that as this right is one of public policy rather than of personal privilege, it is one which the *accused cannot waive.*

READ: 4 Bl. Com., pp. 349, 350;
Rapalje, Criminal Procedure, §§ 145–153;
Clark, Criminal Procedure, §§ 158, 159;
1 Bishop, Criminal Procedure, §§ 890–894;
Abbott, Criminal Brief, pp. 151–157, 200–289;
Hochheimer, Crimes and Criminal Procedure, §§ 141, 142.

§ 606. Of the Trial: the Petit-Jury.

A *petit-jury* for the trial of criminal cases consists of twelve men, unless the local law permits a different number, who are summoned by a *venire* from the body of the county, and are duly sworn and impanelled to try the accused upon a particular indictment. They are subject to *challenges* to the array on account of some defect in the *venire* or its service; and to challenges to the polls on account of known personal bias or unfitness; and to challenges to the favor for some fault which in the judgment of the court may render it unwise to employ them on the panel. Either the prosecutor or the accused may also challenge a certain number peremptorily, or without assigning any reason. All objections to jurors must regularly be made before they are sworn and enter on their duties, but the court may entertain them after the trial has commenced if the reasons for them then first became known to the objector.

Rem. The general rules and customs governing the summoning and challenging a jury, and those which prescribe the obligations and restrictions under which they labor are the same as in the trial of civil cases in the courts of common law. In some particulars, indeed, these rules are even more stringently applied, for the protection of the accused, and to avoid the errors which might result in a reversal of the verdict and its consequent delays.

READ: 4 Bl. Com., pp. 350–355;
Archbold, Criminal Procedure, pp. 485–528;
Wharton, Criminal Pleading, §§ 605–694;
Rapalje, Criminal Procedure, §§ 178–211;
Clark, Criminal Procedure, §§ 160–167;
1 Bishop, Criminal Procedure, §§ 895–951 *f*;
Hochheimer, Crimes and Criminal Procedure, §§ 127–140;
Rice, Criminal Evidence, §§ 147–150.

§ 607. Of the Trial: the Rights of the Accused.

Every person accused of crime has a right to a *public trial* as a safeguard to the interests of justice, though the court has

power to limit the attendance to a reasonable number, and to exclude particular persons who, on moral grounds, ought not to be allowed to listen to the evidence. The accused also has a *right to be present* in the court room, and within sight and hearing of all those proceedings of the trial which bear upon his guilt or innocence, or could affect the verdict of the jury; and if the charge is felony the accused can neither waive this right nor forfeit it by any conduct of his own. Moreover, while he may be kept in custody in the court room if the court fears his escape, yet he must not be subjected to unnecessary restraint nor appear in court confined with chains or similar appliances. Before the trial commences he usually has a right to a *copy of the indictment*, and a list of the witnesses who are to be called against him; and if he has no means to provide for his own defence he may have his own witnesses summoned by the State. He may also require a copy of the names of the proposed jurors; and where the allegations of the indictment are indefinite he is entitled to a *bill of particulars* setting forth the details of the charge. Still further, he has a right to the *presence of the judge* in the court room during all the proceedings; to be *represented by counsel* of his own selection or the appointment of the court; to be *confronted personally with the witnesses* against him; to have their testimony interpreted when necessary, and to enjoy an opportunity to cross-examine and to contradict them; and to be *treated* at all times, by the judge and by the prosecuting officer, *with respect* and consideration, as a citizen whose innocence is presumed, in spite of popular prejudice and suspicious circumstances, until his guilt is demonstrated by legitimate evidence beyond reasonable doubt. Where there are *several indictments* against him which could, with greater economy to the State and advantage to the accused, be tried together, the court may order them to be *consolidated* as if they were different counts in one indictment. Where there are several *joint defendants* they may be tried separately or together as the court directs.

Rem. While these rules for the protection of the accused are carried to the greatest possible extent, yet there is a limit beyond which the public welfare may forbid the State to go. Thus where a prisoner on his trial is so turbulent that the case cannot proceed, or is so dangerous that physical restraint must be imposed upon

him in order to secure the personal safety of those individuals who are necessarily present, the court may take such measures as the emergency demands.

READ: 4 Bl. Com., pp. 355, 356;
Archbold, Criminal Procedure, pp. 311, 312;
Wharton, Criminal Pleading, §§ 540–551, 696–698, 702–705;
Rapalje, Criminal Procedure, §§ 154–156, 214–218, 220;
Clark, Criminal Procedure, §§ 145–155, 171;
1 Bishop, Criminal Procedure, §§ 14–25, 117–126, 265–277, 454–462, 643–646, 952–959 *f*, 1017–1045;
Abbott, Criminal Brief, pp. 21–24, 32–37, 43–46, 86–88, 157–195, 198–199, 293–304;
Hochheimer, Crimes and Criminal Procedure, §§ 126, 144–146;
Rice, Criminal Evidence, §§ 243–247.

§ 608. Of the Trial: the Evidence.

The general rules which govern the production of evidence are the same in criminal as in civil cases. The principal *special rules* are the following: (1) The State must *prove* affirmatively, and *beyond reasonable doubt*, every material allegation in the indictment; (2) In order to warrant a conviction the *testimony* on the entire case *must be* so *conclusive* as to exclude every reasonable hypothesis except that of the defendant's guilt; (3) The *corpus delicti* must be established by evidence other than the extrajudicial admissions of the accused; (4) Where a *specific intent* is laid in the indictment it must be proved as laid: (5) *Circumstantial evidence* is admissible, and where the circumstances are clearly proved, and the inference of guilt necessarily results therefrom, it may be equally conclusive with direct evidence; (6) All matters constituting parts of the *res gestæ* may be produced in evidence, as well as matters proving motive, preparation, or intent to commit the crime, and matters showing its subsequent concealment, or the possession of its fruits, or the consciousness of guilt; (7) If a *conspiracy* is charged and proved the acts of any of the conspirators, in pursuance of the common purpose, and their declarations made in the presence of the defendant, may be given in evidence against him; (8) An *accomplice* may be a witness against the accused, but the testimony of one accomplice is not corroborated by that of another, and it is ordinarily held to be the duty of the judge to instruct the jury not to convict upon such evidence alone; (9)

Evidence given in a former trial of the same defendant on the same indictment may be proved by the record or by those who heard it, provided the witness has since died, or has become insane, or has gone beyond the reach of process, or is kept away from court by the defendant; (10) The *voluntary confession* of the accused, when made neither under fear nor with hope of favor nor as the result of any species of coercion, is competent evidence against him; (11) Where the *defendant* avails himself of his privilege to *become a witness* he is subject to cross-examination and contradiction, like any other witness, on any matter involved in the charge against him; (12) *No witness*, other than the defendant when examined under the preceding rule, can be *compelled to disclose* matters that might entail upon him a criminal prosecution, or expose him to a penalty or to the forfeiture of his estate; (13) *Expert testimony*, when relevant, is admissible as in civil cases; (14) Evidence of the *character of the accused* may be given on his behalf, but never against him except in reply to such evidence first introduced in his favor; (15) In *capital cases* the evidence of guilt must be equivalent in weight and conclusiveness to the direct testimony of two competent and reliable witnesses; (16) In cases of *homicide* the dying declarations of the victim, made under the apprehension of impending death, are admissible to show the cause of death and the person of the slayer.

Rem. *Reasonable doubt* as to the guilt of the accused, the existence of which in the mind of a juror forbids him to vote for a conviction, is a doubt for which the juror has and can give to himself an adequate and satisfactory reason. As persons are not to be convicted because the jury have a suspicion that they may be guilty, so they are not to be acquitted in the face of logically conclusive evidence because a juror suspects that, after all, they may be innocent. Though no weight of mere probabilities can warrant a conviction, yet absolute and infallible certainty is not required. If the testimony is so strong and exhaustive that the juror can see no reason for discrediting it, and no reasonable way of explaining it except by admitting the defendant's guilt, his oath obliges him to vote for a conviction; in any other circumstances he must vote for an acquittal.

READ: 4 Bl. Com., pp. 356–360;
Archbold, Criminal Procedure, pp. 359–427, 436–484, 531–539, 540–545, 798–826;
Roscoe, Criminal Evidence, pp. 40–106;

Kenney, Criminal Law, pp. 316–381;
Wharton, Criminal Evidence, §§ 1–150, 319–481, 623–851;
Rapalje, Criminal Procedure, §§ 224, 227–329;
Clark, Criminal Procedure, §§ 177, 191–223;
Underhill, Criminal Evidence, §§ 1–24, 57–92, 115–153, 169–193, 225, 226;
1 Bishop, Criminal Procedure, §§ 1045–1262;
Abbott, Criminal Brief, pp. 304–590;
McClain, Criminal Law, §§ 395–431;
Hochheimer, Crimes and Criminal Procedure, §§ 148, 149, 154–177;
Rice, Criminal Evidence, §§ 1–98, 153–158, 203–223, 248–272, 306–329, 342–356, 371–380, 417–428.

§ 609. Of the Trial: the Arguments of Counsel.

The *arguments of counsel* take place in the order prescribed by statute or by local usage. At the opening of the trial, and before the production of any evidence, the prosecutor may and generally does state to the jury the nature of the accusation, and the testimony which he intends to bring forward to sustain it. The counsel for the accused, before introducing his evidence, usually explains in the same manner what he claims and expects to prove. These statements should be truthful, and accurately represent the testimony which is to follow. The remaining arguments, which are presented after the evidence has been offered, consist of and should be confined to a discussion of the facts disclosed by the testimony and the law applicable thereto. In some States the counsel for the accused, and in other States the prosecuting officer, has the right to close.

Rem. In criminal as in civil cases it is the duty of the court to keep the arguments of counsel within the limits of truthfulness and decorum. Unwarranted denunciations of the accused by the prosecuting officer, when calculated to prejudice or mislead the jury, are especially objectionable and should be promptly interrupted by the judge; and if he fails to do this, and allows them to continue, it is ground of error.

READ: Archbold, Criminal Procedure, pp. 540, 548–550;
Wharton, Criminal Pleading, §§ 560–579;
Rapalje, Criminal Procedure, §§ 330–343;
Clark, Criminal Procedure, §§ 168–170, 172, 173;
1 Bishop, Criminal Procedure, §§ 960–975 *b*;
Abbott, Criminal Brief, pp. 290–293, 593–609;
Hochheimer, Crimes and Criminal Procedure, § 150;
Rice, Criminal Evidence, §§ 104–134.

§ 610. Of the Trial: the Charge of the Court to the Jury.

The *charge of the court* to the jury consists of an explanation of the law governing the case, and of such a review of the evidence as may be necessary to enable the jury to understand its bearing on the issues, and the application to it of the law. Extraneous matters, and hypotheses which tend to withdraw the attention of the jury from the true issues, or to confuse their minds and memories, and all undue manifestations of prejudice against one side or the other, must be avoided; and the court must confine itself to legitimate endeavors to make the jury comprehend the case and the principles which should guide them in arriving at their verdict. If the counsel on either side desire that particular legal propositions should be stated by the court to the jury, it is their duty to present them to the judge in due season; and should he refuse to repeat them to the jury an exception may be taken, on which a writ of error may be based unless the charge, as actually delivered, correctly and sufficiently explains the law. Any defect in the charge, of which the accused may wish to take advantage, must be called to the attention of the court before or at the time the charge is finished, and if not then corrected by the court an exception should be noted on the record.

Rem. Where the jury are by local statutes made judges of the law, as well as of the facts, the instructions of the court to the jury become even more important, and should be prepared and delivered with the greatest accuracy and clearness, since if the jury then fall into error, through a mistake of law, the fault is irremediable.

READ: Archbold, Criminal Procedure, pp. 529, 530, 540, 548–550, 552–555, 826–830;
Wharton, Criminal Pleading, §§ 707, 708;
Rapalje, Criminal Procedure, §§ 344–360;
Clark, Criminal Procedure, §§ 174–176;
Underhill, Criminal Evidence, §§ 273–280;
1 Bishop, Criminal Procedure, §§ 975 *c*–989 *b*;
Abbott, Criminal Brief, pp. 590–593, 609–704;
Hochheimer, Crimes and Criminal Procedure, §§ 143, 151;
Rice, Criminal Evidence, §§ 135–146.

§ 611. Of the Trial: the Deliberations of the Jury; the Verdict.

The *deliberations of the jury* upon the law and the evidence are conducted in private, while they are under the charge, though

not in the presence, of an officer of the court. In these deliberations it is their duty to confine their attention to the testimony which has been given in open court, and to the law as delivered to them by the judge, and not to receive evidence or information from one another or from outside sources, though if they violate this rule there is ordinarily no way to take advantage of their error. If they are in doubt upon any question of fact or law in the case they may return into the court room, and ask the judge for further instructions. When they are all agreed, either for conviction or acquittal, they appear in court, their names are called, the accused is placed before them, and their foreman announces their verdict of guilty or not guilty upon the matters alleged in the indictment. This verdict, if ratified by the other jurors and accepted by the court, is duly entered and then cannot afterwards be withdrawn or amended, nor can any juror dissent therefrom. When the jury cannot agree upon a *general verdict* of guilty or not guilty, on the indictment as a whole, they may render a *partial verdict;* convicting the accused on one count, or on one part of a divisible count, or of one of the lesser crimes comprehended in the crime alleged in the indictment, and thereby acquit him of the residue. When the facts are intricate, and the law and its application to the facts are difficult for them to understand, they may return a *special verdict,* finding the facts in detail and leaving the legal conclusion from the facts to be determined by the court.

Rem. If after sufficient consultation among themselves the jury cannot agree upon any verdict, they may announce their situation to the court, and request to be dismissed from further consideration of the case. In ancient times it was the custom of the courts to hold the jury together, under various bodily privations, until they did agree on some verdict, and this custom was not without many advantages both to the defendant and the public. But in the modern practice, when it is evident that no voluntary agreement can be reached, the case is withdrawn from their consideration and the accused remanded for another trial.

READ: 4 Bl. Com., pp. 360, 361;
Archbold, Criminal Procedure, pp. 555–572;
Heard, Criminal Pleading, pp. 299–309;
Wharton, Criminal Pleading, §§ 716–758;
Rapalje, Criminal Procedure, §§ 225, 226, 361–378;
Clark, Criminal Procedure, §§ 122, 123, 178–185;

1 Bishop, Criminal Procedure, §§ 990–1016;
Abbott, Criminal Brief, pp. 704–734;
Hochheimer, Crimes and Criminal Procedure, §§ 178–182;
Rice, Criminal Evidence, §§ 152, 159–169.

§ 612. Of Motions for a New Trial: Motions in Arrest of Judgment.

After a verdict of guilty, and before judgment or sentence is pronounced by the court, there are two proceedings of which, if the occasion warrants, the defendant may avail himself. These are (1) A motion for a new trial; (2) A motion in arrest of judgment. A *motion for a new trial* is addressed to the discretion of the court, and prays that the verdict may be set aside and a new trial be directed. This motion may be based upon any material irregularity arising in the course of the former trial, — such as a defect in summoning or impanelling the jury; the misconduct of the prosecutor, or the judge, or any of the jury; misrulings of the court in admitting or excluding evidence, or in charging the jury; the discovery of new and important testimony; the illegality of the verdict, or its want of conformity to the evidence, or its intrinsic invalidity; or any other ground which, if recited in the record, and made the subject of a bill of exceptions, would probably result in a reversal of the judgment on a writ of error. A *motion in arrest of judgment* prays that the court withhold its judgment on the verdict, and discharge the accused from further liability under the indictment, an account of some material defect apparent on the record. This defect must be one which would invalidate the entire proceedings, — such as repugnancy in the indictment, or a variance between the indictment and the verdict. On this motion no new trial can be granted, but the whole proceedings may be dismissed and the defendant be released; leaving him liable, however, to a subsequent prosecution.

Rem. Where a new trial is granted it is held upon the same indictment, but a new *venire* issues and another jury is impanelled; and the trial is conducted in the same manner as if no previous trial had occurred. If the mistakes arising in the former trial, and on account of which the new trial has been ordered, seem to the court to be inevitable and likely to defeat any verdict of guilty that could hereafter be obtained the case with the consent of the accused may be dismissed, and a *nolle prosequi* be entered on the record.

READ: 4 Bl. Com., pp. 375, 376;
Archbold, Criminal Procedure, pp. 316–318, 572–577;
Heard, Criminal Pleading, pp. 316–319;
Wharton, Criminal Pleading, §§ 383, 384, 759–768, 784–902;
Rapalje, Criminal Procedure, §§ 221, 379–382, 394–447, 478–510;
Clark, Criminal Procedure, §§ 54, 186, 189;
1 Bishop, Criminal Procedure, §§ 1263–1288, 1387–1396;
Abbott, Criminal Brief, pp. 195–198, 734–740;
Hochheimer, Crimes and Criminal Procedure, §§ 152, 183, 184;
Rice, Criminal Evidence, §§ 170–185.

§ 613. Of the Judgment or Sentence.

If neither of the foregoing motions is made, or if being made it is overruled, the court proceeds to judgment. The *judgment* is an order of the court directing the kind and measure of the penalty to be inflicted on the accused. It must be pronounced in open court, and must conform to the law which prescribes the punishment. If the crime is a felony, or if the penalty involves corporal punishment, the defendant must be in court to receive the sentence. When the defendant stands convicted of more than one offence, on all of which judgment is to be delivered, the sentence may provide that the execution of the judgments shall take effect successively, one beginning after the other is completed.

Rem. The court has power over the judgment after it has been announced, and may respite or suspend its execution for any reasonable cause. It may also correct or change the judgment at any time during the same term of the court, and before the execution of the judgment has been commenced.

READ: 4 Bl. Com., pp. 376–389;
Archbold, Criminal Procedure, pp. 577–593;
Wharton, Criminal Pleading, §§ 82, 905–946;
Rapalje, Criminal Procedure, §§ 383–393;
Clark, Criminal Procedure, §§ 187, 188;
1 Bishop, Criminal Procedure, §§ 1289–1333;
Abbott, Criminal Brief, pp. 740–753;
Hochheimer, Crimes and Criminal Procedure, §§ 185–188, 194, 195.

§ 614. Of the Writ of Error: Petition for Pardon.

There are two methods by which, even after judgment, the accused may be relieved from the injurious consequences of

any error or mistake in the proceedings. These are (1) A writ of error; and (2) A petition for pardon. A *writ of error* may be brought, as a matter of right, for any mistake of law apparent on the record. The *record* exhibits all the regular proceedings of the court, together with the bill of exceptions; and if the defendant has taken the precaution to object to all the mistakes and misconduct of the judge, the jury, the prosecutor, and other officers, which may have prejudiced his rights, and to have his objections noted and properly incorporated into the bill of exceptions, there will be no substantial errors which he cannot bring before the court of errors for final review. Mere formal mistakes are cured by the verdict, unless they were made the subjects of a demurrer, motion to quash, or plea in abatement, and an exception was noted to the adverse ruling of the court thereon. When a judgment is reversed upon a writ of error the proceedings are invalidated from that stage at which the first error occurred, and unless wholly abandoned must be begun anew at that point of departure. A *petition for pardon* is addressed by the defendant to the executive or other pardoning power, and may urge any matter of fact or law in its support. It may be brought at any time after judgment, and the pardon, if granted, may be complete or partial, absolute or conditional.

Rem. A common ground for pardon is the assistance afforded to the government in convicting an offender by an accomplice who has *turned State's evidence*. There is no rule of law which secures to such an accomplice an immunity from the consequences of his own guilt, thus offering a positive reward for treachery and perjury; but at the same time it is an accepted doctrine of the courts that one, who honestly and truthfully discloses facts which lead to the detection and punishment of crime, is entitled to some consideration, even though he himself participated in the offence. This consideration may be manifested either by a *nolle* of the case against him, or by a milder sentence, or by a complete or partial pardon.

READ: 4 Bl. Com., pp. 329–331, 390–393, 396–402;
Archbold, Criminal Procedure, pp. 615–629;
Heard, Criminal Pleading, pp. 328–341;
Wharton, Criminal Pleading, §§ 770–783;
Rapalje, Criminal Procedure, §§ 448–458;
Clark, Criminal Procedure, § 190;
1 Bishop, Criminal Procedure, §§ 1340–1381;
Hochheimer, Crimes and Criminal Procedure, §§ 196–200, 221–223;
Rice, Criminal Evidence, § 186.

§ 615. Of Execution.

Execution is the infliction upon the offender of the punishment imposed and ordered by the court. Where the punishment is a *fine* the court, in its judgment, directs that the defendant stand committed till the fine is paid; and thereupon, in default of payment, a *mittimus* will issue under which the defendant will be imprisoned till he pays the fine or is discharged by due course of law. When the penalty is *imprisonment* he will be confined, under a *mittimus*, during the period specified in the judgment.

Rem. In both these penalties the precept of the mittimus must be strictly obeyed. It must be served only by the persons to whom it is directed; the confinement must be in the place and manner specified; and at the end of the term of imprisonment the defendant must be released. Any violation of these provisions will subject the wrongdoer to an action for false imprisonment.

READ: Archbold, Criminal Procedure, pp. 630–635, 831–833; 1 Bishop, Criminal Procedure, §§ 1335–1339.

§ 616. Of Stay of Execution in Capital Cases: Pregnancy; Insanity.

In capital cases there are two causes which operate to delay or prevent the execution. When a woman is sentenced to death while *pregnant*, or becomes pregnant after such a sentence, the court by which the sentence was pronounced, upon suggestion of the pregnancy, will cause an investigation to be made, and if the pregnancy is proved will stay the execution of the sentence till the child is born. When a person under sentence of death becomes *insane*, or where the fact of his insanity is first made apparent after sentence, the execution will be stayed till his recovery.

Rem. It has sometimes been held that if, after the birth of one child under a stay of execution, the woman becomes pregnant a second time no further stay of execution will be granted. But it may well be doubted whether the enforcement of such a rule would now be tolerated by the public. The stay of execution in the first pregnancy is allowed not for the sake of the mother but for that of the child, and the same reasons exist in the second,

while the only disadvantage to the State from the delay is the slight inconvenience caused by the detention of the woman in confinement until she is delivered.

READ: 4 Bl. Com., pp. 394–396;
Archbold, Criminal Procedure, p. 635;
Hochheimer, Crimes and Criminal Procedure, § 193.

§ 617. Of Execution in Capital Cases.

Execution in capital cases is performed in pursuance of a warrant, issuing from the court in which the judgment was pronounced, or from some other lawful authority, and directed to the sheriff of the county or some other proper officer, commanding him to inflict the death penalty upon the offender at or within a specified time, and in the manner provided by law. This warrant will protect only those to whom it is directed, and will protect them only when they strictly follow its commands. The warrant must be fully executed; and if through any accident or mistake in the attempted execution death should not occur, and the offender should revive, the execution must be repeated until life is actually extinct.

Rem. If an unauthorized person takes it upon himself to execute a death-warrant, he will be guilty of murder. If the authorized officer executes it in an unauthorized manner, — as by changing the mode of death, — he will be guilty of manslaughter, but if he acted from malice his crime would be murder.

READ: 4 Bl. Com., pp. 403–406.

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